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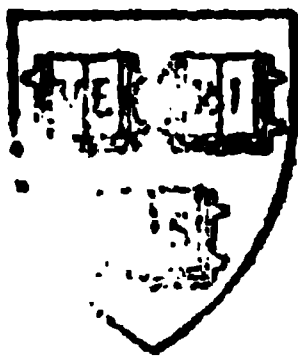
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING THE DECISIONS HANDED DOWN APRIL 18, 1882,
TO AND INCLUDING DECISIONS OF OCTOBER 10, 1882.

WITH

6 & 89

NOTES, REFERENCES AND INDEX.

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ROBERT EARL,

GEORGE F. DANFORTH,

FRANCIS M. FINCH,

BENJAMIN F. TRACY,†

ASSOCIATE JUDGES.

* Appointed November 19, 1881, *vice* Charles J. Folger, resigned.

† Appointed December 8, 1881, *vice* Charles Andrews, appointed Chief Judge.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING APRIL 18, 1882.

SARAH E. BAUCUS, Appellant, *v.* MARY E. STOVER et al., as
Executors, etc., Respondents.

Under the provision of the Revised Statutes (2 R. S. 84, § 13) declaring that any just claim which a testator had against one named as executor of his will shall be included in the inventory, "and such executor shall be liable for the same as for so much money in his hands * * * and he shall apply and distribute the same in the payment of debts," etc., an executor, although insolvent at the time of his appointment, is bound to account for a debt so due from him, and should be charged therewith on settlement of his accounts as for so much money in his hands. (MILLER and FINCH, JJ., dissenting.)

It seems, however, that the liability of the executor is not in all respects the same as if he had actually received so much money; if wholly unable to pay in pursuance of an order or decree of the surrogate, because of insolvency, he cannot be attached and punished for contempt, nor would he be guilty of embezzlement.

It seems also to be proper for a surrogate, in a decree which charges an executor with a debt due from him, to specify the charge thus made separately, so as to protect his rights. (Code of Civil Procedure, § 2545.)

As to whether, where an executor has given security, his sureties will be held responsible for his debt as for so much money received, *quære*.

Baucus v. Stover (24 Hun, 109), reversed.

(Argued March 9, 1882; decided April 18, 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order
SICKELS — VOL. XLIV. 1

Statement of case.

made at the January term, 1881, which affirmed a decree of the surrogate of Washington county on the final accounting of defendants as executors of the will of George Stover, deceased. (Reported below, 24 Hun, 109.)

The material facts are stated in the opinion.

Robert H. McClellan for appellant. It was error in the surrogate not to require Barr to account for his note, inventoried as an asset, and not to make a decree against him on the accounting. (2 R. S. 84, § 13; *Decker v. Miller*, 2 Paige, 149; *Marvin v. Stone*, 2 Cow. 784; *Gardener v. Miller*, 19 Johns. 188; *Soverhill v. Suydam*, 2 T. & C. 460; 59 N. Y. 140; *Adair v. Brimmer*, 74 id. 539; *Bigelow v. Bigelow*, 4 Ohio, 138; *Miller v. Donaldson*, 17 id. 164; *Gottsberger v. Taylor*, 19 N. Y. 150; *Stephens v. Gaylord*, 11 Mass. 269; *Leland v. Felton*, 1 Allen, 531; *Choate v. Arrington*, 116 Mass. 552; *Bentley v. Chapin*, 10 Cush. 173; *Ipswich Manuf. Co. v. Story*, 5 Metc. 310; *Sigourney v. Weatherall*, 6 Mass. 553; *Commonwealth v. Gould*, 118 id. 300, 307; *Kinney v. Ensign*, 18 Pick. 232; *Chapin v. Waters*, 110 Mass. 195; *Hayes v. Jackson*, 6 id. 150; *Hazleton v. Valentine*, 113 id. 472, 480; *Mattoon v. Cowing*, 13 Gray, 387; *Dorchester v. Webb*, Croke's Cas. 372; *Hull v. Pratt*, 5 Ohio, 72; *Miller v. Donaldson*, 17 id. 164; *Jacobs v. Woodside*, 6 S. C. 490, 498; *Norris v. Towle*, 54 N. H. 290; 23 Eng. [Moak] 165, note; W'ms on Ex'rs [6th ed.], 1310, marg. page, note; *Embury v. Connor*, 3 N. Y. 511.) The intention of the law-makers was to put executors and administrators in the same relation as to claims against them held by the decedent as is manifest from the provision that both executors and administrators shall make oath to the inventory that it contains, among other things, a statement of all just claims of the deceased against such executor or administrator. (2 R. S. 84, § 16; 1 id. 311.) If the statute means what it says, that the executor is to be liable for his debts as for so much money in his hands, then the claim would be barred in six years from the time an accounting could be demanded. (*Thompson v. Thompson*, 1

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Brad. 29; *Van Vleck v. Burroughs*, 6 Barb. 341; *Clark v. Chadeagne*, 10 Hun, 97; *Clark v. Ford*, 1 Abb. Ct. of App. Dec. 359.)

D. M. Westfall for respondents. The surrogate properly refused to charge Barr with the amount of his note as so much cash in his hands. (*Everts v. Everts*, 62 Barb. 577, 583; *Gardner v. Miller*, 19 Johns. 190; *Marvin v. Stone*, 2 Cow. 781; *Decker v. Miller*, 2 Paige, 149; *Smith v. Lawrence*, 11 id. 207; *Wurtz v. Jenkins*, 11 Barb. 546; *Soverhill v. Suydam*, 2 T. & C. 464; Appendix to 3 R. S. [2d. ed.] 640; *Brownell v. Akin*, 6 Hun, 378.) The decree of the surrogate is not a bar to the claim on Barr's note, nor does it in any way prevent a proceeding in equity to establish or enforce the claim. (3 R. S. [6th ed.] 102, § 79 [65], subd. 3; *Grover v. Holley*, 2 Brad. 291; *President, etc., of Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216; *Decker v. Miller*, 2 Paige, 150; *Smith v. Lawrence*, 11 id. 208, 209; *Wurtz v. Jenkins*, 11 Barb. 547; 24 Hun, 113, 114.)

Per Curiam. At the time of his death George Stover held a note against James Barr for \$4,561.91 and he named Barr and the other two respondents executors of his will. The executors filed with the surrogate an inventory of the estate of the deceased in which the note against Barr was entered as follows: "Note of James Barr, dated April 1st, 1874, for \$4,561.91, balance due at this date \$3,753.11, which note we consider very doubtful of collection of any part." At the time of the death of the testator, Barr was utterly insolvent and he has ever since remained so, and has been unable to pay any part of the balance due from him upon the note. Upon the accounting before the surrogate the creditors claimed that Barr should account for the balance due upon the note as so much money in his hands under the following provision of the Revised Statutes (2 R. S. 84, § 13): "The naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor,

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but such claim shall be included among the credits and effects of the deceased in the inventory, and such executor shall be liable for the same as for so much money in his hands at the time such debt or demand becomes due, and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal estate of the deceased." The surrogate held that Barr was not liable to account for this balance as so much money in his hands and his decision was affirmed by the General Term.

We are of opinion that the courts below erred. Before the Revised Statutes the general rule at common law was that the appointment by a creditor of his debtor as his executor extinguished the debt, so that the executor was in no way bound to account for the same as assets. The provision of the Revised Statutes which we have quoted was intended to abrogate this common law rule and introduce a new system in reference to such debts. It was the obvious purpose of the statute not only to save the executor's debt from extinguishment, but, in order to obviate all difficulty, doubt and embarrassment, to cause it to be regarded as money in his hands. Such is the plain reading of the statute. The language is free from doubt and ambiguity, and needs no construction or interpretation. If it had been intended simply that the debt should be placed upon the footing of any other debt due the deceased and merely to save it, for what it was worth, from extinguishment the section could have stopped at the word "inventory," and the balance thereof would have been without any purpose or meaning. But it goes further ; it not only provides that the debt shall not be discharged and shall be included in the inventory, but it also provides that the debtor executor shall be liable for the debt as for so much money ; and not only that, but that he shall apply and distribute the money in the payment of debts and legacies and among the next of kin. We perceive no room for doubt ; the statute says the debt shall be treated as money, and the courts have no right to say it shall not be so treated. This construction will not necessarily involve an insolvent executor in hardship and embarrassment. If a debtor unable to pay his

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debt is named executor he may decline to accept the office. While the debt must be treated as money in his hands for the purpose of administration it will not for all purposes stand on the same footing as if he had actually received so much money. If wholly unable to pay the money in pursuance of the order or decree of the surrogate on account of his insolvency, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other debtor. It is also clear that an executor unable to pay his own debt, and thus unable to comply with the decree of the surrogate charging him with it as so much money in his hands, would not be guilty of embezzling the money and could not be convicted of crime as he could be if he embezzled money or property which actually came into his hands. There would be the absence of all criminal intent and actual wrong-doing without which the crime could not be committed.

It would be well for a surrogate in a decree which charges an executor with a debt as so much money under the provision of law above quoted, to specify the charge thus made separately so as to save all the rights of the executor and to protect him against consequences which perhaps ought not to follow from such a charge; and this can now be accomplished under section 2545 of the Code of Civil Procedure, which provides that the surrogate must file in his office his decision, upon any case tried before him, in writing, stating separately the facts found and the conclusions of law.

It was stated upon the argument of this case that this executor had been required to give security for the performance of his duties. Whether his sureties could be held for this debt as so much money actually received by him we are not now called upon to determine, and do not determine.

We are, therefore, of the opinion that the surrogate should have charged Barr with the balance due upon his debt and the interest thereon as so much money in his hands, and should have ordered him to apply and distribute the same as so much money.

The judgment of the General Term and the decree of the surrogate should be reversed and the case should be remitted

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to the surrogate, and the appellant should recover her costs out of the estate.

MILLER, J. (dissenting). The question presented upon this appeal relates to the construction to be placed upon the provisions of section 13, 2 R. S. 84, which is as follows: "The naming of any person executor in a will shall not operate as a discharge or bequest of any *just claim* which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased in the inventory, and such executor *shall be liable for the same* as for so much money in his hands at the time such debt or demand becomes due, and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased."

Prior to the enactment of the statute cited, and at common law, if a creditor appointed his debtor an executor of his will, it operated as a release or a bequest of the debt, unless the debtor renounced his executorship. (*Soverhill v. Suydam*, 59 N. Y. 140; 2 T. & C. 460, 465.) It is said by RAPALLO, J., in the case cited in the opinion delivered in the Court of Appeals, that "the statute was intended to, and did abolish this rule, and that it was enacted in order to obviate the incongruity of requiring the executor to proceed against himself for the collection of the debt." This is also obvious from the note of the Revisers to the section cited. (3 R. S. [2d ed.] 640.)

Such being the purpose of the statute, it is not apparent how it can be extended by construction so as to charge an executor absolutely with the debt, under all circumstances, whether the demand be good or bad, whether the executor be solvent or insolvent, or whether he has or has not a defense to the claim and it is just and proper, or otherwise.

If the object was as stated in the opinion of the learned judge in the case cited, then the debt manifestly occupies the same position as any other demand in favor of the estate, and the executor is subject to the same rule as is applicable to him in regard to other claims against debtors. If it was not

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collectible, the executor is exonerated, and the statute meant merely to hold the executor as liable for the debt as moneys in his hands when he was personally able and had means to pay the same. The object of the enactment is an important element in its interpretation, and that being determined by the case cited, and any construction beyond that being too far reaching and not consistent with that object, we are of the opinion that the authority is directly in point and should be decisive upon the question considered.

This construction is also supported by reading the statute cited in connection with other provisions relating to and defining the duties and obligations of executors. In the case of other assets coming to the hands of the executor, if they are good they should be collected, and he would be responsible for due diligence in enforcing payment thereof, and it would be open for him to prove upon an accounting that they were without value during the period that he was entrusted with the estate. Various provisions of the statute sustain this view. Section 69 (3 R. S. [6th ed.] 100), which relates to accountings, provides that allowances shall be made to executors and administrators for property "perished or lost" without their fault. No exception is made so that it shall not apply to an executor's debt, and to hold it is inapplicable to any debt that is lost without fault is to restrict its construction, which could not have been intended.

The demand here was of no value and was lost without any fault of the executor. Section 70 (3 R. S. [6th ed.] 101) declares that neither executors nor administrators "shall sustain any loss by decrease without their fault, of any part of the estate, but they shall * * * be allowed for such decrease upon the settlement of their accounts." No proviso is made that this section is not to apply to a debt against an executor. The construction claimed is also in conflict with section 14 (3 R. S. (6th ed.) 733), which declares that in actions against executors in which the inventory shall be given in evidence, the plaintiff or defendant may rebut the same by proof "that such property has perished or been lost." And the next sec-

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tion, fifteen, provides that in such action "the defendant shall not be charged for any demands or rights of action specified in their inventory, unless it appears that such demands or rights of action have been collected, or might have been collected with due diligence."

The statutes referred to were passed mostly at the same time, and to establish a system applicable to estates and the accounting and acts of executors and administrators, and they must all be swept away and rendered of no avail if section 14 is susceptible of the construction claimed by the appellant's counsel. The greater or more extended provisions must yield to a single enactment, instead of that being construed in conformity with the general purposes of the law and the evident intention of the law makers.

The statute in question was the subject of judicial interpretation in the Supreme Court, and in *Everts v. Everts* (62 Barb. 577) it was held that it did not apply to all claims against an executor, but to any just claim. It is said in the opinion of the court by MULLIN, J., "The executor is *prima facie* chargeable, *but it is* competent for him to show the claim unfounded and unjust." It proceeds then to say: "It is not every claim which the testator had against the person named as executor, that becomes 'assets;' but it is any '*just claim.*' * * * The validity or justice of the claim *must, when denied*, be, in some way, determined, * * * and it must be tried in the surrogate's court, in the same way, and for the same reason, that claims *against* the estate *in favor* of the executor, must be tried in that court."

The same doctrine is held by the General Term in the third department of the Supreme Court in *Brownell v. Akin* (6 Hun, 378). In that case it was decided that when the defendant was appointed, and had qualified as an executor, and was indebted to the estate at the time, that in an action brought to recover the same, a writ of *ne exeat* could not be issued.

In *Adair v. Brimmer* (74 N. Y. 539), relied upon by the appellant, one of the executors had received the amount of his legacy without paying his debt, and also much more of the

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estate which he had squandered, and afterward became insolvent. The principal question was whether the conduct of the co-executor in permitting him to receive and squander the estate, was of such a character as to charge him with the loss thus occasioned, and whether in the joint accounts the debts of some of them should be credited as uncollectible, and it was held that funds advanced to one executor in excess of the share to which he is entitled as legatee, if made by and with the consent of the others, must be deemed assets remaining in the hands of all the executors, and they were severally and jointly accountable therefor as such."

It will be seen that the distinct question now presented did not arise. Nor is it presented in any of the other cases cited from this State. We have examined the Massachusetts cases, and while it is held that the common-law rule as to the discharge of executors from liability for their own debts did not prevail in that State, there was no statute on the subject, and the decisions are not applicable to the case now considered. In the case of *Norris v. Towle* (54 N. H. 290), the administrator became insolvent after his appointment, and afterward took the benefit of the Bankrupt Act, and his estate did not pay fifty per cent of his debts. It was held that under the statute of that State, which provides that a debt due from the administrator to the estate should be assets and accounted for as other debts, and he was bound to account for the whole debt, and it made no difference whether he was solvent or insolvent at the time he was appointed administrator. The facts differ from the case at bar, and the statute is not the same as the one now under consideration. Nor is it apparent whether the statute in New Hampshire is affected by other statutes bearing upon the subject, as in the case here. Some other authorities are cited, but none of them present the precise question as to the solvency of the executor or administrator.

The weight of authority in this State is clearly adverse to the appellant's claim. In principle no reason exists why an executor should be held to any other or different obligation in regard to a debt due from him, than he should in regard to

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any other assets which may come into his hands. No stricter rule should be imposed in his own case than in any other. Primarily, it is presumed that his debts are paid to the estate, and that he has the money to distribute. But this, as in the case of any other demand, is open to inquiry and investigation; and he has a right to show that he was, and is insolvent and unable to meet the obligation. The statute was not intended to embrace a case where the debt was worthless, and there was an utter inability to pay the same. Any other or different construction would place an insolvent executor in a most unfortunate position. The debt he owed, which was of an ordinary character, would be converted into one for which he would be liable to arrest and imprisonment, and by virtue of the statute, he would become an embezzler of moneys which he had never collected or received as executor, and which he would have been unable by any diligence, effort or means within his power to obtain. While guilty of no wrong, he would still be liable to be punished and treated as a wrong-doer and a criminal. The legislature could not thus have intended to add to the cases of imprisonment and for punishing the debtor, when its entire policy has been in an adverse direction and to restrict, and not to increase, cases where punishment should follow inability to meet pecuniary engagements. Such a policy would be contrary to its uniform course and the spirit of the age.

It is suggested that the criminal intent would be wanting to convict of embezzlement. The statute in question declares that the executor shall be liable "as for so much money in his hands." He has the money according to the statute, and if he does not pay it, and in law appropriates it to his own use, he thus brings himself directly within chapter 208 of the Laws of 1877. It is also said that he should decline to serve and thus escape liability. The answer is that there is no statute which disqualifies him or prohibits his serving. He may be a good and safe executor, as he appears to have been here, although he has no pecuniary means. And if objected to on the ground of insolvency, he may be required to give security. In the latter contingency his bondsmen would be liable, and thus compelled

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to pay for a deficiency which did not exist and had no reality. Nor would it be a defense that he never had the money in his hands, for the statute says that he did have it, and the surrogate must decree accordingly if he strictly follows the statute. Clearly the statute never could have been intended to convert a worthless debt into a demand, the payment of which might be enforced by imprisonment, and by making sureties liable, who never intended or expected to assume any such obligation, and who were not understood to assume it at the time they became sureties.

The general principle may also be invoked in support of the views which we have expressed that a trustee in the discharge of his duty should not be held responsible for money that he receives, except in case of negligence and a failure to discharge such duty. In regard to the right of the appellant to prosecute the claim against the executor, we think that in case the executor becomes able to pay the debt a further accounting may be had, and that the decree is not conclusive. (3 R. S. [6th ed.] § 79, p. 102.) Nor does it interfere with an equitable action to enforce payment of the demand. As the executor acted as trustee, it is not entirely apparent how he could avail himself of the statute of limitations as a bar to any future accounting.

The judgment of the General Term should be affirmed.

All concur for reversal except MILLER and FINCH, JJ., dissenting.

Judgment reversed.

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THE PEOPLE, ex rel. NEIL GILMOUR, Superintendent, etc., Respondent, v. FREDERICK HYDE et al., Appellants.

The superintendent of public instruction has no power to remove the principal of a normal school established under the act of 1866 (Chap. 466, Laws of 1866), without the concurrence of the local board.

The provision of said act (§ 4) declaring that the "employment" of teachers in said schools shall be subject to the approval of the superintendent, refers to the act of hiring. When the approval is once given, the contract of employment is complete, and the teacher can only be discharged by

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the authority in whom the power to employ is vested, i. e., by the concurrent act of the local board and the superintendent.

It is not within the power of the superintendent, by annexing conditions to his approval, to change the law regulating the discharge of teachers of these schools.

The local board of a normal school employed one H. as principal, which employment was approved by the superintendent "to continue in force during the pleasure of the board and the superintendent;" thereafter the superintendent withdrew his approval and directed the local board to recommend another principal, and upon its declining so to do, made an appointment himself which the board refused to recognize. In proceedings by *mandamus* to compel such recognition, *held*, that the superintendent had no authority to attach to his approval the qualification stated; that, notwithstanding the action of the superintendent, H. remained principal, and the refusal of the board to make a new appointment was not an omission "to discharge its duties" within the meaning of the amendatory act of 1869 (Chap. 18, Laws of 1869), and so did not authorize the superintendent to discharge such duties.

(Argued March 23, 1882; decided April 18, 1882.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made September 20, 1881, which affirmed an order of Special Term awarding a peremptory writ of *mandamus*, commanding the defendants, who constituted the local board of the State Normal School at Cortland, "to no longer procure or permit James H. Hoose to perform the duties of, or in anywise to act in said school as principal," and "to officially recognize James M. Cassety as the principal teacher."

The material facts are stated in the opinion.

Samuel Hand for appellants. This is not a case where *mandamus* will lie. (*People v. Stephens*, 5 Hill, 616, 629; *People v. Inspectors of Schools*, 44 How. 322; 1 R. S. 124, §§ 50, 56; 2 id. 582, § 32; *Moses on Mandamus*, § 49; *People v. Schegham*, 20 Barb. 302; *People v. Suprs. of Greene*, 12 id. 217; *People v. Lane*, 55 N. Y. 217; *People v. B'd of Education*, 2 Abb. [N. S.] 177; 12 Am. Dec. 28, *n.*) This position of principal teacher is an "office." (*In re Wood*, 2 Cow. 1, 30, *n.*; *Henly v. Mayor*, 5 Bing. 91, 107; *People v. Com.*

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Council, 77 N. Y. 503, 507; *People v. Nostrand*, 46 id. 375.) The relator shows no beneficial interest in the *mandamus* and has, therefore, no standing in court. (*Com. B'k v. Canal Comm'rs*, 10 Wend. 25; *Rex v. College of Physicians*, 5 Burr. 2740; 2 Johns. Cas. [2d ed.] note.) The removal of the principal of the Cortland Normal School can only be upon concurrent action of the board and the superintendent. (Potter's Dwarries, 129, 133, 140; *People v. Ins. Co.*, 15 Johns. 380; *Tonnele v. Hall*, 4 Comst. 140, 144; *Newell v. People*, 7 N. Y. 97; *Stevens v. Duckworth*, Hard. 341, pl. 1; *King v. Poor Law Comm'rs of St. Pancras*, 6 Ad. & Ell. 1; Laws of 1866, chap. 466, §§ 3, 4.) Any general words in the act of 1866 must be held restrained and defined with reference to the employment of teachers by the section (§ 4) particularly providing for that subject. (*Elmendorf v. Lansing*, 5 Cow. 468; *Smith v. People*, 46 N. Y. 330, 337; Potter's Dwarries, 128; Rule 17 of Vattel.) The approval of the relator, having been once placed upon the act of hiring, cannot be withdrawn thereafter, at his will or caprice. (*People v. Supers.*, 35 Barb. 408; *Bigler v. Mayer*, 5 Abb. [N. S.] 51; *Jermant v. Wagoner*, 1 Hill, 279; *People v. Ames*, 19 How. 551; *Buffalo v. Mackay*, 15 Hun, 304; 15 U. S. Stat. 1867-69, 710; *Marbury v. Madison*, 1 Cranch, 139; *Ennis v. Schroeder*, 76 N. Y. 163; *Wilder v. United States*, 5 Ct. of Claims, 468, 475; *United States v. Speed*, 8 Wall. 83.) The uniform usage of the superintendents, including the present one, to regard the appointing or nominating power as in the local board, and claiming for themselves only the approving or confirming power, is conclusive on the question of construction. (*People v. Dayton*, 55 N. Y. 367; *Eaton v. Pickersgill*, id. 310; *Fort v. Burch*, 6 Barb. 60; *Striker v. Kelly*, 7 Hill, 9; *United States v. Dickson*, 15 Pet. 161.) The power of appointment being expressly given to the board and the superintendent (they appointing and he approving), in the absence of an express power of removal given to anybody, that power must belong to the appointing power, and hence cannot be exercised by a portion of it. (*People v. Comptroller*, 20 Wend. 595;

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People v. Fire Comm'rs, 73 N. Y. 437, 441; *Ex parte Hennen*, 13 Peters, 230; *Nelson v. Coake*, 44 Mass. 352.)

Leslie W. Russell, attorney-general, for relator. It was the design of the law to clothe the superintendent with superior power to that of the local board, and confer on him the right to decide, should disagreement come, when an employment of a teacher must terminate. (Laws of 1866, chap. 466, §§ 1, 3; *People v. Mayor*, 5 Barb. 43; *Lambier v. Mayor*, 4 Sandf. 109; *People v. Comptroller*, 20 Wend. 595; Const. N. Y., art. 10, § 3; Laws of 1875, chap. 567, § 3; Laws of 1866, chap. 466, §§ 3, 4; Webster's Dictionary; Worcester's Dictionary; definitions, "appointment," "employment.") The terms of the appointment give the superintendent the right to withdraw at his pleasure and terminate the employment. (1 Cruise' Dig., Real Prop. 244, 246; 7 Ad. & Ell. 957; 2 Blackst. Com. 145; *Raw v. Alderson*, 7 Taunt. 453; *Hunt v. Chamberlain*, 3 Halst. [N. J.] 336.) The superintendent being empowered to determine the employment of the principal, it was the duty of the local board to recognize instead of repudiating his action. (Laws of 1869, chap. 18.) The hiring of the principal teacher was in no sense the appointment of an officer. (*Olmstead v. Mayor*, 10 J. & S. 481; *Union Co. v. Jones*, 21 Penn. St. 525; *Butler v. Regents*, 52 Wis. 124.) If it was, and the superintendent had the superior power, he could remove. (*People v. Comm.*, 73 N. Y. 437; *Matter of Hennen*, 13 Pet. 230-259; *Nelson v. Coake*, 44 Mass. 352.) Because the superintendent has seen fit to approve the teachers suggested by the board in past instances, it is no bar to his exercising his right to disapprove, or to withdraw approval, or to exercise his power of appointment, especially when the board refuses to suggest an appointment. (15 Pet. 161.) It was the duty of the superintendent, upon whom the responsibility for the due maintenance of the school rested, to see that the board acted as was their duty, and if his direction to them was powerless to effect this, he had the right to resort to the law. (*People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y.

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334.) The only appropriate remedy was *mandamus*. (Laws of 1880, chap. 348; *People v. Medical Soc.*, 32 N. Y. 187; *Gilman v. Bassett*, 33 Conn. 298; *Green v. African Soc.*, 1 S. & R. 254; *Fuller v. Trustees*, 6 Conn. 532; *People v. Steele*, 1 Edm. 505; *Buck v. Lockport*, 43 How. Pr. 361; *McCullough v. Mayor*, 23 Wend. 458; *People v. Judges*, 20 id. 658; 5 Wait's Pr. 550.)

TRACY, J. The question presented for the determination of the court in this case is, whether the superintendent of public instruction can, without the concurrence of the local boards, remove the principals of the normal schools established under the provisions of chapter 466, Laws of 1866. By this act training schools for the education and disciplining of teachers for the common schools of this State, not exceeding four in number, were to be established in different counties of the State, to be located by a commission of State officers named in the act.

The third section of the act provides that local boards to be appointed by the superintendent of public instruction shall have "the immediate supervision and management of such schools, subject, however, to his (the superintendent's) general supervision, and to his direction in all things pertaining to the school."

It is further provided that "it shall be the duty of such board to make and establish, and from time to time alter and amend such rules and regulations for the government of such schools under their charge respectively as they shall deem best, which shall be subject to the approval of the superintendent of public instruction. They shall also severally transmit through him, and subject to his approval, a report to the legislature on the first day of January in each year, showing the condition of the school under their charge during the year next preceding, and which report shall be in such form and contain such an account of their acts and doings as the superintendent shall direct."

By section 4 it is provided that "it shall be the duty of the

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local board, subject to the approval of the superintendent of public instruction, to prescribe the course of study to be pursued in each of said schools."

By section 5 it is provided that "all applicants shall be subject, before admission, to a preliminary examination before such of the teachers of the school as shall be designated by the local board for that purpose. * * * That any pupil may be dismissed from the school by the local board for immoral or disorderly conduct, or neglect or inability to perform his duties."

By the fourth section the superintendent of public instruction is to determine "what number of teachers shall be employed in each school and their wages, whose employment shall also be subject to his approval. To order, in his discretion, that one or more of said schools shall be composed exclusively of males and one or more of females. To decide upon the number of pupils to be admitted to each of said schools and to prescribe the time and manner of their selection."

By the sixth section it is made the duty of the superintendent "to prepare suitable diplomas to be granted to the students. The local boards are to be appointed by the superintendent of public instruction, and to hold their offices until removed by the concurrent act of the chancellor of the University and the superintendent."

In 1869 (Chap. 18) an additional section was added to the act of 1866, providing that "during such time any local board shall omit to discharge its duties the said superintendent is authorized to discharge the duties of such local board, or any of its officers, and the act of the superintendent in the premises shall be as valid and binding as if done by a competent local board or its officers, or with their co-operation."

In 1877 the local board at Cortland employed Professor Hoose as principal at a salary of \$2,500 per year, and said employment was approved by the superintendent, "to continue in force during the pleasure of the board and the superintendent." In July, 1880, the superintendent withdrew his approval of the employment of Professor Hoose, and directed the

board to recommend some competent principal in his place. The board, not recognizing the authority of the superintendent to remove Professor Hoose without its concurrence, declined to recommend a new principal. The superintendent, treating this refusal of the board as an omission to discharge its duty within the meaning of the eighth section of the act as amended in 1869, thereupon employed Professor Cassety as such principal. The board refusing to recognize Professor Cassety a *mandamus* was applied for to compel such recognition. If the superintendent had no power to remove Professor Hoose it is clear that the order granting the *mandamus* is erroneous and must be reversed. It is not pretended that any express power of removal is conferred on the superintendent by the statute. It is claimed on the part of the relator, and the court below held, that the word "employment," as used in the statute, does not mean "the act of hiring," but "the state of being employed." That such state could continue only so long as the superintendent approved said employment. And when he withdrew his approval the state of employment ceased, and the teacher was discharged. We are of opinion that this is not a correct construction of the statute. There can be no employment in the sense ascribed to this word by the court below without an act of hiring. No act of hiring can be complete without the approval of the superintendent. Obviously the act which the superintendent is required to approve must be that of some authority other than himself. For this court to hold that the legislature intended to require an officer to approve his own act in order to give it validity would be to convict the legislature of an absurdity. We are thus forced to the conclusion that the legislature intended that the contract of hiring should, in the first instance, be made by the local board having "the immediate supervision and management of the school," subject to the approval of the superintendent. The approval of the superintendent refers to an act to be done and not to a state of mind. When the approval required by the statute is once given the contract of employment is complete, and the teacher can

be discharged only by the authority in whom such power is vested.

It is also claimed that power to remove a teacher is conferred upon its superintendent by that clause of the act which provides that "the local board shall have the immediate supervision and management of the school, subject to the general supervision of its superintendent and to his direction in all things pertaining to its school." It is a well-settled rule that "in the construction of a statute every part of it must be viewed in connection with the whole so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each." (Potter's Dwaris, 144; *People v. Utica Ins. Co.*, 15 Johns. 380; *Tonnele v. Hall*, 4 Comst. 140-144; *Newell v. The People*, 7 N. Y. 97; *King v. Poor Law Comm'rs of St. Pancras*, 6 A. & E. 1.)

It will be observed that in conferring power upon the local boards the legislature employs the words "supervision," "charge" and "management." The board is to have the "immediate supervision and management of the school." "They are to make a report showing the condition of the schools under their charge." "They are to make and establish rules and regulations for the government of such schools under their charge respectively." In defining the powers of the superintendent the words "charge" and "management" nowhere occur. He is nowhere given the charge or management of the school. The supervision and management of the board is immediate, the supervision and direction of the superintendent is general. The exclusive powers of the superintendent are all general in their character, and most of them relate to such as are essential to the organization of the school.

He is a member of the commission to locate the schools he appoints the local boards, he determines the number of teachers in each school and their wages, he determines the number of pupils to be admitted to each of said schools, to order that one or more of said schools shall be composed exclusively of males and one or more exclusively of females, and he also determines the time and manner of their selection.

The exercise of these powers vested exclusively in the superintendent must, in the first instance, precede the opening of the school, but the school, when once in operation, passes under the "immediate supervision and management" of the local board, subject only to the general supervision and direction of the superintendent. But under the authority of general supervision and direction he cannot assume the power of immediate management. It is certain that what the board may do, subject to his general supervision, he cannot do himself. The power to dismiss a pupil for immoral or disorderly conduct is vested exclusively in the board. It can hardly be contended that by force of the clause "subject to his general supervision and to his direction in all things pertaining to the school" he can himself dismiss a pupil for such cause. Nor can he prescribe the course of study or designate the teacher to conduct the preliminary examination. These are duties to be performed by the local board, subject only to his supervision and direction. We regard the act of 1869 as a legislative construction of the act of 1866 in accordance with the views here expressed. It assumes that the duties devolved upon the local board by the act of 1866 could, under that act, be performed only by such board, and where it omitted to perform them they could not lawfully be performed at all. For the purpose of remedying this defect in the law it was enacted that if "during such time any local board shall omit to discharge its duties, the said superintendent is authorized to discharge the duties of such local board or any of its officers." If the construction of the act of 1866 contended for by the relator be correct, the act of 1869, instead of conferring new and additional powers upon the superintendent, imposed a most important limitation upon the powers conferred upon him by the act of 1866.

If, by subjecting the local board "to his direction in all things pertaining to the school," the act of 1866 made him a co-ordinate authority with the board in respect to all duties devolved on it, so that whatever the board might do "subject to his general supervision" he could himself do equally with said board, such co-ordinate power was taken away by the act of 1869, for

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it is clear that under the last-mentioned act he can perform no duty devolved on the board except where it omits to perform such duty. It is manifest that the act of 1869 was not passed to limit the powers of the superintendent, but to enable him in the contingency mentioned to discharge duties which, under the act of 1866, he was not competent to perform. That the legislature did not intend to subordinate the local boards wholly to the superintendent is further proved by the fact that while he is authorized to appoint the local boards, he cannot remove them without the concurrence of the chancellor of the University. The schools to be established under this act were to be widely separated and all distinct from the office of the superintendent. In the judgment of the legislature local supervision and management was essential to their success. To be effective it must have power, not only to supervise, recommend and report, but to act, to manage and control. In subjecting this immediate local management to the general supervision of a remote authority it was not intended to destroy or weaken it, but to give it the benefit of the superior intelligence of the superintendent, acquired by a broader and more diversified experience in school management. To give to the word "direction," as used in the statute, the force and effect contended for by the relator would reduce the local board to a mere nullity and place the schools under the immediate supervision of the superintendent. In the absence of any express statutory provision the right to remove the principal of one of these schools can be exercised only by the authority empowered to employ. (*People ex rel. Sims v. Fire Commissioners*, 73 N. Y. 437-441; *People ex rel. Lyndes v. Comptroller*, 20 Wend. 595; *Ex parte Hennen*, 13 Peters, 230; *Nelson v. Coake*, 44 Mass. 352.) A concurrent act of two separate authorities was, in this case, requisite to effect an employment, and it follows that such a concurrence was alike requisite to effect a removal. Nor can it be maintained that in this case the employment of Professor Hoose was, in law, conditional. It is true the superintendent attached to his approval a statement that the employment in question should continue during the

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pleasure of the local board and the superintendent. We think it clear that he had no right to attach such a qualification. The exercise of such a power by him would substitute the caprice of either of the branches of the appointing power for the joint act of both, as the instrument of removal, and deprive the teacher of that certain tenure of employment which the law had provided in his behalf. The legislature intended that his employment and its continuance should rest on the conjoint action of an immediate and a remote authority, and not in the pleasure of either acting by itself. It is not within the power of the superintendent, by annexing conditions to his approval of the employment, to change the law regulating the discharge of the teachers of these schools. We are of opinion that Professor Hoose, notwithstanding the action of the superintendent was still the principal of the Normal School at Cortland, and in refusing to recognize Professor Cassety as such principal, the local board did not omit to discharge any duty imposed upon it by law.

It is undoubtedly true that divided counsels and distracted action would prove disastrous to the school; but the law has recognized this difficulty and provided against it. If the local board, upon whom the responsibility of immediate supervision is devolved, shall mismanage the school, the entire board or any member of it may be removed by the superintendent, with the concurrence of the chancellor of the University.

Such a construction of the statute preserves to the school the benefits of an independent local supervision, while it enables the superintendent to arrest a perverse or pernicious course of management before it has impaired the usefulness of the school. Such, we think, was the scheme of the law.

It follows that the orders of the General and Special Terms must be reversed and the application for a *mandamus* denied.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

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THE NEW YORK STATE MONITOR MILK PAN ASSOCIATION
(Limited), Respondent, v. THE REMINGTON AGRICULTURAL
WORKS, Appellant.

The provision of the Code of Civil Procedure in regard to amendments (§ 723) does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants.

N. Y. S. M. M. P. Co. v. R. A. Works (25 Hun, 475), reversed.

(Argued April 11, 1882; decided April 18, 1882.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 23, 1881, which reversed an order of Special Term denying a motion on the part of plaintiff for leave to amend the summons and complaint herein, by striking out the name of the defendant and inserting in its stead the names of three individuals as defendants, and by inserting the necessary averments required by reason of such change. The order of General Term granted the motion. (Reported below, 25 Hun, 475.)

Thomas Richardson for appellant. No jurisdiction was obtained over Philo Remington, by the service of the summons herein upon him. (*Shaw v. Clock*, 78 N. Y. 194.) Section 452 of the Code of Civil Procedure provides simply for cases where one or more of the original parties had such an interest as would enable him to sustain the action, but where the controversy would not be completely settled without the presence of other parties. (*Davis v. The Mayor, etc.*, 14 N. Y. 527; *Warring v. Warring*, 3 Abb. 248; *McMahon v. Allen*, 12 How. 39-45; 1 Wait's Pr. 162; *Shaw v. Clock*, 19 Hun, 173; 78 N. Y. 194; *McGarry v. Bd. of Supervisors*, 7 Robt. 464; *Bassett v. Fish*, 75 N. Y. 303, 315.)

F. Jacobs, Jr., for respondent. The court obtained jurisdiction of the person of Philo Remington by personal service of the summons and complaint upon him. (Code, § 723; *McGarry*

Opinion *per Curiam*.

v. *Bd. of Supers.*, 1 Sweeney, 223; Wait's Code, § 173; *Traver v. Eighth Ave. R. R. Co.*, 3 Keyes, 497; *McElwain v. Corning*, 12 Abb. 116; *Newton v. Milleville Manuf. Co.*, 17 id. 318, n.; *Fuller v. Webster F. Ins. Co.*, 12 How. 293.) The prosecution of a suit by an individual banker in a name importing a corporate character, under which he carried on business, is a merely formal error, amendable in the courts of original jurisdiction. (*Bk. of Havana v. McGee*, 20 N. Y. 355; *Cazett v. Hubbell*, 36 id. 681; *Walsh v. Washington Ins. Co.*, 33 id. 439; *Risley v. Wightman*, 13 Hun, 164; *Bassett v. Fish*, 75 N. Y. 303; *Tighe v. Pope*, 16 Hun, 181; *N. Y. Ice Co. v. North-western Ins. Co.*, 23 N. Y. 357; 20 id. 81; 30 id. 383; 31 id. 564; *Ford v. Belmont*, 7 Rob. 506, 508; *Harrington v. Slater*, 22 Barb. 161; 26 id. 356; 44 id. 528; 21 How. 296; 27 id. 179; *Englis v. Furmis*, 3 Abb. 82.) The only way in which the defendant could avail himself of the misnomer or misdescription herein was by answer. This he has failed to do. The objections now made to correct the mistake in defendant's name are dilatory and should not prevail. (*Miller v. Stettiner*, 22 How. 521; 28 id. 400; *Waterbury v. Mather*, 16 Wend. 613; 3 Keyes, 497.) Where a party uses all due diligence to discover the true name of a party and fails, he may designate the defendant by any name. (Code, § 451; *Crandall v. Beech et al.*, 7 How. 271; *Pindar v. Block*, 4 id. 95.) Where a defendant is known as well by one name as by another, he may be sued by either. (*Eagleston v. Son*, 5 Robt. 640.) Plaintiff may sue by any name, and upon learning the true name of defendant, the pleading or proceeding may be amended accordingly. (*Miller v. Stettiner*, 7 Bosw. 692; *Griswold v. Sedgwick*, 6 Cow. 456; *Wood v. Wood*, 26 Barb. 359.)

Per Curiam. The order to amend in this case authorizes the striking out of the name of the defendant and the insertion of the names of three persons as defendants in lieu thereof. Its effect is to continue the action against other and different parties than the one named, thus substituting a cause of action

Statement of case.

with new and other defendants. Such an amendment is not we think, authorized by any provision of the Code or any of the adjudged cases. Section 723 of the Code of Civil Procedure does not cover any such case. While full authority is conferred for adding or striking out the name of a person or a party, or correcting a mistake in such name, it does not sanction an entire change of name of the defendant by the substitution of another or entirely different defendants. The authorities relating to the question are fully considered in the opinions of the General Term, and it is not necessary to examine them upon this appeal. Although some cases are cited which are supposed to sanction such a rule, they are not well founded and have not received the approval of this court. The cases of *Bassett v. Fish* (75 N. Y. 304) and *Shaw v. Cock* (78 id. 194), without citing other cases, are directly in point and settle the question adversely to the claim of the respondent's counsel. Upon the authority of these decisions the General Term erred, and the order reversing the order of the Special Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

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| 89 | 24 | ANN LITTLEWOOD, as Administratrix, etc., Appellant, v. THE |
| 117 | 548 | |
| 89 | 24 | MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW |
| e164 | 152 | YORK, Respondent. |

When one injured by the wrongful act, neglect or default of another brings suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury, his personal representatives cannot maintain an action under the act of 1847 (Chap. 450, Laws of 1847).

Said act was not intended to impose a double liability, but simply to give a right of action where a party, having a good cause of action for a personal injury, was prevented, by death resulting from such injury, from enforcing his right or who omitted in his life-time so to do.

It seems, that the legislature has the power to create the double liability. *Schlichting v. Wintgen* (25 Hun, 626), overruled.

(Argued February 6, 1882 ; decided April 25, 1882.)

Statement of case.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 2, 1881, which overruled plaintiff's exceptions and directed judgment on an order dismissing the complaint on trial. (Mem. of decision below, 15 J. & S. 547.)

This action was brought to recover damages for the death of Patrick Littlewood, plaintiff's intestate, alleged to have been caused by defendant's negligence.

The answer alleged and it was admitted on the trial that plaintiff's intestate during his life-time brought suit against defendant for the injuries sustained by him at the time and place mentioned in the complaint herein, which action was tried and judgment recovered, which was paid by defendant.

Edward D. McCarthy for appellant. The judgment obtained against defendant by plaintiff's intestate is not an adjudication of this plaintiff's right and is not a bar to this action. (*Leggatt v. The Railway Co.*, 1 Q. B. Div. 599; *Whitford v. The Railway Co.*, 23 N. Y. 465.) The action brought by the intestate of the plaintiff did not involve the same subject of dispute as does plaintiff's. (*McIntire's Case*, 37 N. Y. 287; *Quinn v. Moore*, 15 id. 435.) The judgment was not one obtained by or on behalf of one with whom the plaintiff is privy in estate; the two rights of action are distinct and not provable by the same evidence. (79 N. Y. 634.) The statute does not limit the right of recovery of the next of kin to cases where their intestate did not recover a personal satisfaction. (*Whitford's Case*, 23 N. Y. 465; *Leggatt's Case*, 1 Q. B. Div. 599.)

Arthur H. Masten for respondent. The purpose of chapter 450, Laws of 1847, was to extend or continue the liability which arose at common law upon the commission of a wrongful act, not to create a new and additional liability therefor. (Laws of 1847, chap. 450, §§ 1, 2; Laws of 1849, chap. 256, p. 388; Laws of 1870, chap. 78, p. 215; *Green v. H. R. R. Co.*, 2 Abb. Ct. App. Dec. 282; *Safford v. Drew*, 3 Duer, 636; Maxwell on Interpretation of Statutes, 35; *Furman v. The Mayor*, 5 Sandf. 37; Cooley on Torts, 264; *Barron v. Ill. Cent. R. R.*,
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1 Bissell, 412.) The foundation of the action given by the statute is the wrongful act, neglect or default therein mentioned, and not the violation of any right of property in the life of the deceased, held by the husband, widow or next of kin. (*Curran v. Warren C. & Mfg. Co.*, 36 N. Y. 153; *Wilds v. Hudson River R. R. Co.*, 24 id. 430; *Willets v. B. & R. R. Co.*, 14 Barb. 585; Addison on Torts [Wood's ed.], § 575; id. [Cave's ed.], 551; Cooley on Torts, 264; Shearman & Redfield on Negligence [3d ed.], §§ 301, 302; *Perkins, Admæ.*, v. *N. Y. C. & H. R. R. Co.*, 24 N. Y. 196; *Bissell v. N. Y. C. & H. R. R. Co.*, 25 id. 442; *Kinney v. Central R. R.*, 32 N. J. 407; Wood's Mayne on Damages [1st Am. ed.], § 708; Wait's Actions and Defenses, 476; *Whitford v. Panama R. R. Co.*, 23 N. Y. 487; *R. R. Co. v. Barron*, 5 Wall. 90.) Defendant having once responded in damages for the negligent act, which is the foundation of the plaintiff's action, all liability for such act has been extinguished, and compensation therefor cannot be exacted a second time. (Addison on Torts [Dudley & Baylie's ed.], 735, 1156; 1 Sedgwick on Measure of Damages [7th ed.], 705; *Fetter v. Beale*, 1 Ld. Raym. 339; *Bonomi v. Backhouse*, 27 L. J. Q. B. 390; *Whitford v. Panama R. R.*, 23 N. Y. 487; *Hodsoll v. Stollebras*, 11 Ad. & Ell. 301; *Whitney v. Clarendon*, 18 Vt. 252; *Read v. Gt. E. R. Co.*, L. R., 3 Q. B. 555; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42; *Curtis v. R. & S. R. R. Co.*, 18 id. 534; *Drew v. Sixth Ave. R. R. Co.*, 26 id. 49; Sedgwick on Measure of Damages [7th ed.], 544; *Dibble v. N. Y. & E. Ry.*, 25 Barb. 187; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417.) The statute should be so construed that its results will be in conformity with the established rules of the common law, and not with the exceptions thereto. (Sedgwick on Construction of Statutes, 270; *Wilbur v. Crane*, 13 Pick. 284, 290; Maxwell's Interpretation of Statutes, 264; Potter's Dwarries on Statutes, 185; Smith's Commentaries on Stat. and Const. Law, §§ 448-449.)

RAPALLO, J. The counsel for the plaintiff is sustained by the authorities in the proposition upon which he mainly bases his

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argument in this case, viz. : That the right of action given by the act of 1847, to the personal representatives of one whose death has been caused by the wrongful act, neglect or default of another, is a new right of action created by the statute, and is not a mere continuation in the representatives, of the right of action which the deceased had in his life-time. But it seems to me that this is not the point upon which the case turns, and that the true question is, whether, in enacting the statute, the legislature had in view a case like the present, where the deceased in his life-time brought his action, recovered his damages for the injury which subsequently resulted in his death and received satisfaction for such damages; and whether it was intended to superadd to the liability of a wrong-doer, who had paid the damages for an injury, a further liability in case the party afterward died from such injury, for the damages occasioned by his death, to his next of kin; or whether the intention of the statute was to provide for the case of an injured party who had a good cause of action, but died from his injuries without having recovered his damages, and in such a case to withdraw from the wrong-doer the immunity from civil liability afforded him by the common-law rule that personal actions die with the person, and to give the statutory action as a substitute for the action which the deceased could have maintained had he lived.

There can be no doubt that the legislature had power to create the double liability contended for, nor would it necessarily involve any inconsistency. The damages of the party injured are different and distinguishable from those which his next of kin sustain by his death, and no double recovery of the same damages would result. But it is equally clear that the legislature might give to the representatives the statutory right of action, only as a substitute for the damages which the deceased was prevented by his death from recovering, and the question now is, what was their intention in this respect?

The language of the act plainly indicates, I think, that the framers had in view the common-law rule, "*actio personalis*" etc., and that their main purpose was to deprive the wrong-doer of the immunity from civil liability afforded by that rule.

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The entire gist of the first section is that the wrong-doer "shall be liable to an action for damages *notwithstanding the death of the person injured* and though the death shall have been caused under such circumstances as amount in law to a felony." It does not provide that the wrong-doer shall be liable notwithstanding that he shall have satisfied the party injured, or notwithstanding that the latter has recovered judgment against him, or notwithstanding any other defense he might have had at the time of the death, but merely that the *death* of the party injured shall not free him from liability ; showing that this is the point at which the statute is aimed.

The condition upon which the statutory liability depends is declared to be, "that the act, neglect or default is such as *would* (if death had not ensued) *have entitled the party injured to maintain an action and recover damages,*" etc.

This language is accurate if the act was intended to apply to the case of a party who, having a good cause of action for a personal injury, was prevented by the death which resulted from such injury, from pursuing his legal remedies, or who omitted in his life-time to do so. It precisely fits such a case, but it is singularly inappropriate to the case of one who has in his life-time maintained the action and actually recovered his damages. The form of expression employed in the act shows that the legislature had in mind the case of a party *entitled* to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action and recovered his damages.

This still more strongly appears by reference to the words of the act which describe the wrong-doer against whom a right of action is given. He is not described by any language which is applicable to a party against whom judgment has been obtained by the deceased for the injury, but as "the person who *would have been liable* if death had not ensued." And the enactment is that this person shall be liable notwithstanding the death. It seems to me very evident that the only defense of which the wrong-doer was intended to be deprived, was that afforded him by the death of the party injured, and that it is, to say the least,

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assumed throughout the act that at the time of such death the defendant was liable. In the present case the defendant does not answer the description of "the person who would have been liable if death had not ensued." It would not have been liable if the injured party were living, for the former judgment would be a complete bar. The statute may well be construed as meaning that the party who at the time of the bringing of the action "would have been liable if death had not ensued" shall be liable to an action notwithstanding the death, etc.

It is argued, and the adjudications sustain the argument, that the condition that the wrongful act, etc., must be such as would have entitled the party injured to maintain an action, has reference to the circumstances of the injury, and the character of the act, including the question of contributory negligence, etc. This is undoubtedly true, and such is the purport of the language. But it does not follow that it can have no further effect, and that it cannot be considered for the purpose of determining whether the right of action created by the statute was intended to be given in cases where the deceased had in his life-time actually recovered damages for the injury, or only in cases where he could have recovered them had he lived, but had not done so. That was not the question before the court in the case of *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, where this condition was commented upon. The point there decided was that the statute created a new right of action, and was not a mere continuation in the personal representative, of the right of action which had been vested in the deceased in his life-time, and that consequently the action could not be maintained where the wrongful act was committed without this State. The effect of the provision that "the person who would have been liable if death had not ensued shall be liable," etc., as bearing upon the question now at issue, was not considered in that case.

In *Dibble v. N. Y. & Erie R. R. Co.*, 25 Barb. 183, a settlement between the wrong-doer and the deceased was held to be a bar to an action by his representative, he having died from the injuries. That case came before this court, but the appeal does not appear ever to have been decided, though several times

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argued, the court having been divided. (21 How. Pr. 593; 23 id. 599.) The decision of the Supreme Court cannot, in the light of subsequent cases, be sustained on the ground that the representative suing under the statute merely succeeded to the right of action of the deceased and was for that reason barred by his release: but on the ground that the statute was not intended to subject the defendant to an action where he had made compensation to the deceased in his life-time and would not have been liable if the deceased had not died, I think the conclusion was correct. The present case, however, is still stronger for the reasons before stated.

We have very little authority to guide us in coming to a conclusion. The only adjudication in point in this State sustaining the claim of the plaintiff is the decision of the General Term in the second department in *Schlichting v. Wintgen* (25 Hun, 626), and against this may be set off the judgment of the General Term of the first department in the present case. The cases cited from Vermont do not aid us much, for in that State an action for personal injuries survives to the personal representatives, and in enacting the statute giving a right of action for the benefit of the next of kin it must necessarily have been the intention to superadd that liability to the liability which was enforceable by the deceased. In England the only case in point is *Read v. Great Eastern Railway Co.* (L. R., 3 Q. B. 555), decided in 1868, under Lord CAMPBELL's Act, 9 and 10 Victoria, chapter 93, which is substantially like the act of 1847, the first section of which is a transcript of the first section of the English statute. It was held in that case that a plea of accord and satisfaction with the deceased in his life-time was a good bar to an action by his legal representative. The decision was put upon two grounds, first, that by the terms of the act the defendant was not liable because the deceased was not, at the time of his death, entitled to maintain an action; and second, that it was not the intention of the statute to make the wrong-doer pay damages twice for the same wrongful act, but only to prevent him from being freed from liability by the death of the party injured, and to enable his representatives to maintain an action where before

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the statute the maxim *actio personalis*, etc., would have exempted him from civil liability to any one, and that the statute only pointed to such a case. It is claimed that the authority of this case is shaken by subsequent adjudications, but those referred to do not seem to me to have any such effect. *Pym, Adm'x, v. Great Northern Railway Co.* (2 Best & Smith, 761), and *S. C.* (4 Best & Smith, 397), was decided before the *Read Case* and does not touch or approach the same point. *Bradshaw v. Lancashire, etc., Railway Co.* (L. R., 10 C. P. 189), decided in 1875, held that, where the death of a person was caused by negligence on the part of a railroad company which had contracted to carry him, his executrix had a right of action, independently of the statute, for the damages which his estate had sustained by such breach of contract, and that Lord CAMPBELL's act did not take away such right of action. *Leggott, Adm'x, v. The Great Northern Railway Co.* (L. R., 1 Q. B. Div. 599), decided in 1876, was the converse of the *Bradshaw Case* just cited, and held that a recovery by the administratrix under Lord CAMPBELL's act was no bar to a subsequent action by the same administratrix for the damages to the estate of the deceased, caused by his injuries. The soundness of the decision in the *Bradshaw Case* was doubted, but it was yielded to as an authority. The *Read Case*, however, was not questioned.

Barnett v. Lucas (5 I. Rep. [C. L.] 140), and *S. C. on appeal* (6 id. 247), decides the same point as the *Leggott Case*. In none of the cases cited had the deceased recovered damages for the personal injury from which death ensued, and the question was not involved in any of them whether Lord CAMPBELL's act applied to a case where such a recovery had been had. In each of the cases cited the action was brought by the representative, as such, for a cause of action claimed to have survived, and such an action was held to have no connection with, and not to be affected by, an action under Lord CAMPBELL's act, which was founded upon a personal injury for which no cause of action survived. I find no inconsistency between these cases and the *Read Case*, nor does the authority of that case or its reasoning

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appear ever to have been questioned. It is not, it is true, an authority binding upon us, but as showing how the statute is understood in the country where it originated and from which we adopted it, it is entitled to much weight.

I can find nothing in the act of 1847 or the amendments of 1849 and 1870 manifesting an intention to impose the liability in question, where the deceased has in his life-time recovered compensation for his injuries. The act has made an important change in the common law, in affording a remedy in cases where the death would have protected the wrong-doer against any recovery whatever; and in holding it applicable to such cases only, we think that all is accomplished that the legislature intended. The argument in favor of the construction contended for on the part of the plaintiff is based largely upon the provisions relating to the damages to be recovered and the disposition to be made of them. Some provisions on those subjects were necessary by reason of the novelty of the action, and such have been adopted as were deemed most appropriate. But they should not control the construction of that part of the statute which imposes the liability, or extend it beyond the fair import of its terms.

If the act had squarely declared that an action might be maintained by the legal representative, notwithstanding a recovery by or an accord and satisfaction with the deceased in his life-time, the legislature might well have paused before enacting it, to consider the policy of such a provision, and, as suggested in the opinion of JOHNSON, J., in the *Dibble Case* (25 Barb. 189), how prejudicially it would operate upon the interests of the party injured, by depriving him of the power of settling his claim or realizing any thing from it in his life-time. It would naturally if not inevitably prevent such settlements and procrastinate litigation until it could be determined whether death would ensue from the injury. There would be little inducement to settle the damages without suit, because whatever might be paid to the injured party would neither bar nor diminish the claim of his representative, should death ensue. The statute should not be strained to bring about such a result, nor should

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be reached unless required by the plain language of the enactment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HELEN L. HALL, Respondent, v. JOHN P. BROOKS, CLARK
BROOKS, Appellant.

No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff.

An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein, *held*, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. *Hall v. Brooks* (25 Hun, 577), reversed.

(Argued February 28, 1882; decided April 25, 1882.)

APPEAL by Clark Brooks from an order of the General Term of the Supreme Court in the second judicial department at the December term, 1881, which reversed an order of Special Term, denying a motion on the part of plaintiff that said Clark Brooks be required to deliver to the sheriff of the city and county of New York certain property belonging to the defendant in this action, against whom an attachment had been issued herein. (Reported below, 25 Hun, 577.)

The order of the General Term directed the delivery of the property and that said Brooks pay personally plaintiff's costs and disbursements. In compliance with the order of General Term, Brooks delivered up the property.

Henry W. Bookstaver for appellant. The order appealed from is without authority in law. (Code of Civil Procedure, §§ 649,

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650, 651, 655; *Skinner v. Stuart*, 15 Abb. Pr. 391; reversing 13 id. 442.) If the plaintiff or the sheriff was entitled to any relief under the facts in this case, he should have proceeded as provided in section 655 of the Code, either by an action or special proceeding in which the real parties in interest might have been heard. (Code of Civil Procedure, §§ 3333, 3334, 767, 768.) If the property attempted to be levied upon was capable of manual delivery, it was the sheriff's duty to take it wherever he could find it, and to use whatever force might be necessary to enable him to perform his duty. (*Fuller v. Mack*, 2 Atk. 415; *Platt v. Brown*, 16 Pick. 553; *Burton v. Wilkinson*, 18 Vt. 186; *Cantrell v. Connor*, 6 Daly, 39; *Hubbard v. Mace*, 17 Johns. 127; *Glover v. Whittenhall*, 6 Hill, 597; Crocker on Sheriffs, § 444; 2 R. S. [Edm. ed.] 441, §§ 80, 81, 82; *Yale v. Matthews*, 20 How. 430; *Haggerty v. Wilber*, 16 Johns. 287; *Beekman v. Lansing*, 3 Wend. 446; *Westervelt v. Pinckney*, 14 id. 123; *Green v. Burke*, 23 id. 490; *Barker v. Binninger*, 4 N. Y. 270; *Wood v. Orser*, 25 id. 348; *Burkhardt v. Sanford*, 7 How. Pr. 329; Crocker on Sheriffs, § 371.) If the property was not capable of manual delivery, the sheriff could make a levy upon it without seeing it, simply by serving a certified copy of the warrant upon the person holding said property, with a notice showing the property attached. (Code of Civil Procedure, §§ 649, subd. 3, 650, 651; *Skinner v. Stuart*, 15 Abb. Pr. 391, reversing, 13 id. 442.) The order appealed from is in the nature of a *mandamus*, which is never allowed when the remedy of the party, if any, is clearly by action. (*People v. Easton*, 13 Abb. [N. S.] 159; *People v. Croton Aq. B'd*, 49 Barb. 259, 264.) Section 717 of the Code of Civil Procedure cannot be invoked, because that section is limited to property which is the subject of the action or special proceeding, and this property is not "the subject of the action." (*Whitehead v. B. & L. H. R. R. Co.*, 18 How. 218, 223; *Pres'dt, etc. v. Rutland & W. R. R. Co.*, 10 id. 1, 8.) The remedies provided in the Old Code (§§ 227-243), as amended in the New Code (§§ 635-712), are the only remedies known to the law in attachment proceedings; and neither

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of the remedies thus provided relate to or support a motion or proceeding of this nature. (*Skinner v. Stuart*, 15 Abb. Pr. 301; 24 How. Pr. 489; *O'Brien v. Mechs. & Trad. F. Ins. Co.*, 14 Abb. Pr. (N. S.) 314, note; *O'Brien v. Glenville Woolen Co.*, 50 N. Y. 128; *Thurber v. Blanck*, id. 80; *Mech., etc., B'k v. Dakin*, 51 id. 519.) The fact that under compulsion, and under protest, Mr. Brooks complied with the imperative order of the court, does not have the effect of destroying his right of appeal. (*Matter of N. Y. C. & H. R. R. Co. v. Armstrong*, 60 N. Y. 116; *Barker v. White*, 58 id. 204; *Higbie v. Westlake*, 14 id. 281.)

Henry G. Atwater for respondent. The order is not appealable, because Clark Brooks is not a party aggrieved, under section 1294 of the Code. (*Steele v. White*, 2 Paige, 478; *Cuyler v. Moreland*, 6 id. 273; *Hone v. VanSchaick*, 7 id. 222; *Card v. Bird*, 10 id. 426; *Kelly v. Israel*, 11 id. 152; *Idley v. Bowen*, 11 Wend. 223; *Allegheny Bank Appeal*, 48 Penn. St. 328; *Arrowsmith v. Rappelye*, 19 La. Ann. 327; *Elcon v. Lancasterian School, etc.*, 3 Patton, Jr., & Heath [Va.], 69.) The order of the General Term is sustainable under section 655 of the New Code of Civil Procedure. (*Dezell v. Odell*, 3 Hill, 215; *White v. Madison*, 26 N. Y. 126; *U. S. v. Graff*, 67 Barb. 304.)

RAPALLO, J. The only authority to make the order appealed from is such as can be found in section 655 of the Code of Civil Procedure, which provides that in executing an attachment, the sheriff may maintain an action or special proceeding in his own name or in the name of the defendant, to reduce to his actual possession an article of personal property capable of manual delivery, but of which he has been unable to obtain possession.

No authority is given to order a person holding property of the attached debtor to deliver it to the sheriff, on motion of the attaching creditor. The action or proceeding for that purpose must be instituted by the sheriff, either in his own name or that of the debtor.

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The order appealed from was not made in any action or proceeding instituted by the sheriff, but was made in the action in which the attachment was issued, and on motion of the attorney for the plaintiff in that action. The sheriff does not appear to have been a party to the proceeding. For this reason the order was irregular and unauthorized. The respondent, however, moves to dismiss the appeal on the ground that the appellant has obeyed the order and delivered the property to the sheriff, and this fact is proved by affidavit and conceded, though it is denied that such obedience was voluntary.

If the appellant had any interest in the property delivered up, which would entitle him to restitution upon a reversal of the order, we should sustain his appeal. But he does not claim any such interest, and, on the contrary, states in his affidavit that he has no personal interest whatever in any of the proceedings. He has not, therefore, been aggrieved by the order except in so far as it adjudges costs against him. That part of the order should be reversed and the appeal as to the residue dismissed, without costs in this court to either party.

All concur, except TRACY, J., absent.

Ordered accordingly. -

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CHARLES A. DANOLDS, Respondent, v. THE STATE OF NEW YORK; Appellant.

Where a valid contract has been entered into, on behalf of the State by its duly authorized agents, for the construction of a public work, it cannot, in the absence of any stipulation authorizing it so to do, destroy or avoid the obligation of the contract.

While it may refuse to perform and arrest performance on the part of the contractor, it is liable for the breach of the contract the same as an individual, and the contractor is entitled to claim prospective profits.

The constitutional provision which denies to the State the power to pass laws impairing the obligations of contracts applies as well to contracts made by the State as to those made by individuals.

The building commissioners appointed under the act of 1870 (Chap. 427, Laws of 1870), "in relation to the State Reformatory," had authority to let by contract the work of erecting the buildings provided for by the act.

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Said commissioners let to the lowest bidders, and entered into various contracts for the work ; after the contractors had entered upon the performance thereof, by the act of 1874 (Chap. 323, Laws of 1874) and the action taken under it, further performance was arrested, and the remaining work was let to other contractors who completed it. A claim for damages for the breach of the contracts, on the part of the State, which claim consisted principally of prospective profits, was presented to the State board of audit. It appeared that the contracts were fairly let and upon terms then favorable to the State, and an award was made in favor of the claimant. On appeal taken by the attorney-general under the act of 1881 (Chap. 211, Laws of 1881), *held*, that in the absence of any provisions in the contracts prohibiting or inconsistent with the allowance of such prospective profits, the award was right.

The contracts contained provisions to the effect that in case the execution of the contract should be suspended on the part of the State, no claim for prospective profits or work not done should be allowed, but the contractor should have the right to complete the work when the State ordered it to be resumed. *Held*, that these provisions did not authorize or contemplate the entire abrogation or repudiation of the contracts, and did not protect the State from liability for the prospective profits, as the contractors were denied the right to complete the work when it was resumed.

The contracts also contained agreements on the part of the contractors that in case the quantities of work, as exhibited at the time of the letting, should be increased or diminished, they would perform at the stipulated prices and make no claim for damages in consequence of the change. *Held*, this did not authorize the abrogation of the contracts.

One of the contracts contained a provision that, in case of a suspension of the work for six months, by reason of a failure of the legislature to make appropriations, an estimate and account up to the time of suspension should be made and the contractors paid in full. *Held*, that this provision did not affect the claim, as the contract was not suspended simply but repudiated.

McKee v. U. S. (12 Ct. of Claims, 504); *S. C.* (97 U. S. 233), distinguished. *It seems* that if the State is not ordinarily liable for prospective profits, it may be subjected to such liability by legislative enactment, and the act constituting the board of audit (Chap. 444, Laws of 1876), which allows to claimants against the State the same measure of relief and justice as they would be entitled to were the claims against individuals, authorized the award made.

By the said act of 1881, authorizing appeals from decisions of the board of audit to the General Term of the Supreme Court, the General Term was clothed with the same power above specified, possessed by the board.

(Argued April 14, 1882 ; decided April 25, 1882.)

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The order appealed from was not made in any action or proceeding instituted by the sheriff, but was made in the action in which the attachment was issued, and on motion of the attorney for the plaintiff in that action. The sheriff does not appear to have been a party to the proceeding. For this reason the order was irregular and unauthorized. The respondent, however, moves to dismiss the appeal on the ground that the appellant has obeyed the order and delivered the property to the sheriff, and this fact is proved by affidavit and conceded, though it is denied that such obedience was voluntary.

If the appellant had any interest in the property delivered up, which would entitle him to restitution upon a reversal of the order, we should sustain his appeal. But he does not claim any such interest, and, on the contrary, states in his affidavit that he has no personal interest whatever in any of the proceedings. He has not, therefore, been aggrieved by the order except in so far as it adjudges costs against him. That part of the order should be reversed and the appeal as to the residue dismissed, without costs in this court to either party.

All concur, except TRACY, J., absent.

Ordered accordingly. -

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CHARLES A. DANOLDS, Respondent, v. THE STATE OF NEW YORK, Appellant.

Where a valid contract has been entered into, on behalf of the State by its duly authorized agents, for the construction of a public work, it cannot, in the absence of any stipulation authorizing it so to do, destroy or avoid the obligation of the contract.

While it may refuse to perform and arrest performance on the part of the contractor, it is liable for the breach of the contract the same as an individual, and the contractor is entitled to claim prospective profits.

The constitutional provision which denies to the State the power to pass laws impairing the obligations of contracts applies as well to contracts made by the State as to those made by individuals.

The building commissioners appointed under the act of 1870 (Chap. 427, Laws of 1870), "in relation to the State Reformatory," had authority to let by contract the work of erecting the buildings provided for by the act.

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Said commissioners let to the lowest bidders, and entered into various contracts for the work ; after the contractors had entered upon the performance thereof, by the act of 1874 (Chap. 323, Laws of 1874) and the action taken under it, further performance was arrested, and the remaining work was let to other contractors who completed it. A claim for damages for the breach of the contracts, on the part of the State, which claim consisted principally of prospective profits, was presented to the State board of audit. It appeared that the contracts were fairly let and upon terms then favorable to the State, and an award was made in favor of the claimant. On appeal taken by the attorney-general under the act of 1881 (Chap. 211, Laws of 1881), *held*, that in the absence of any provisions in the contracts prohibiting or inconsistent with the allowance of such prospective profits, the award was right.

The contracts contained provisions to the effect that in case the execution of the contract should be suspended on the part of the State, no claim for prospective profits or work not done should be allowed, but the contractor should have the right to complete the work when the State ordered it to be resumed. *Held*, that these provisions did not authorize or contemplate the entire abrogation or repudiation of the contracts, and did not protect the State from liability for the prospective profits, as the contractors were denied the right to complete the work when it was resumed.

The contracts also contained agreements on the part of the contractors that in case the quantities of work, as exhibited at the time of the letting, should be increased or diminished, they would perform at the stipulated prices and make no claim for damages in consequence of the change. *Held*, this did not authorize the abrogation of the contracts.

One of the contracts contained a provision that, in case of a suspension of the work for six months, by reason of a failure of the legislature to make appropriations, an estimate and account up to the time of suspension should be made and the contractors paid in full. *Held*, that this provision did not affect the claim, as the contract was not suspended simply but repudiated.

McKee v. U. S. (12 Ct. of Claims, 504); *S. C.* (97 U. S. 233), distinguished. *It seems* that if the State is not ordinarily liable for prospective profits, it may be subjected to such liability by legislative enactment, and the act constituting the board of audit (Chap. 444, Laws of 1876), which allows to claimants against the State the same measure of relief and justice as they would be entitled to were the claims against individuals, authorized the award made.

By the said act of 1881, authorizing appeals from decisions of the board of audit to the General Term of the Supreme Court, the General Term was clothed with the same power above specified, possessed by the board.

(Argued April 14, 1882 ; decided April 25, 1882.)

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APPEAL under chapter 211, Laws of 1881, from judgment of the General Term of the Supreme Court, in the fourth judicial department, made January 11, 1882, which affirmed an award of the board of audit.

The material facts are stated in the opinion.

Leslie W. Russell, attorney-general, for appellant. The building commissioners obtained and could obtain no authority to enter into contracts that would tie up and embarrass the execution of the public duties of the sovereign power. (*Britton v. Mayor*, 21 How. Pr. 251.) When a contract between the State and an individual has been abrogated by the State, the measure of damages is that sum which will compensate the citizen for the actual loss sustained. (1 R. S. [Banks' 6th ed.] 600, §§ 223, 224; 3 Opinions Att'y-Gen'l, 216, 227; *Easton v. Pickersgill*, 55 N. Y. 310; *People, ex rel. Williams, v. Dayton*, id. 367; *Fort v. Burch*, 6 Barb. 60; 9 Wheat. 362; *Lansing v. Smith*, 4 Wend. 9; *Killinger v. The Forty-second St. R. R. Co.*, 50 N. Y. 210; Parsons on Contracts, 8; *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. 544-546; Story on Agency, § 319; *Gibbons v. U. S.*, 8 Wall. 269; *Thompson v. U. S.*, 9 Ct. of Cl. 187; *McKee v. U. S.*, 12 id. 504; Constitution, art. 7, § 3; Laws of 1870, chap. 55, § 2.) Where performance is prevented by the act of the law, the contract is terminated. (2 Parsons on Contracts, 186; *Baylies v. Fettyplace*, 7 Mass. 324.) The measure of damages in such case is the value of the labor performed or the materials furnished. (*Jones v. Judd*, 4 N. Y. 411.) The act which authorized the appointment of the building commissioners (Chap. 323, Laws of 1874) and the one which terminated the contract entered into by them were public acts. (*Calkins v. Baldwin*, 4 Wend. 667; *Lansing v. Smith*, 8 Cow. 146.) The latter was an act which, in its sovereign capacity, the State was in duty bound to cause to be passed, but the fact of its passage gives this claimant no right to damages for injuries arising therefrom. (Cooley on Const. Lim. 284; *Jones v. U. S.*, 1 Ct. of Claims, 383; *Deming v. U. S.*, id. 190; *Wilson v. U. S.*, 11 id. 513; *Mayor, etc., v. Sec-*

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ond Ave. R. R. Co., 32 N. Y. 261; *Britton v. Mayor, etc.*, 21 How. Pr. 251; *Presbyterian Church v. Mayor, etc.*, 5 Cow. 538.) The provision of the Constitution that a State cannot by law impair the obligations of a contract does not apply to a claim directly against the State, for the State may not be sued in any court by one of its own citizens, and so is not within the purview of the Constitution of the United States, which cannot be said to have contemplated such a contingency. (Sedgwick on Damages [4th ed.], 657; *Eddings v. Seabrook*, 12 Rich. [S. C.] 504; *Munn v. People*, 69 Ill. 81; affirmed, 94 U. S. 113; *Radcliff's Ex'rs v. Mayor*, 4 Comst. 195; *In re N. Y. C. & H. R. R. Co.*, 6 Hun, 149; *In re U. V. & J. R. R. Co.*, 35 How. Pr. 420.)

Geo. B. Bradley for respondent. The building commissioners had power to make the contracts in question, for the materials and construction of the buildings, etc. (Laws of 1870, chap. 427; *Lord v. Thomas*, 54 N. Y. 107, 109; *People v. Stephens*, 71 id. 527, 550; Laws of 1871, p. 1560; Laws of 1872, p. 1765; Laws of 1874, p. 393.) The presumption is that the legislature, when it made appropriations, was advised and knew that the contracts had been made. (*Brown v. Mayor*, 63 N. Y. 244; *People v. Flanagan*, 66 id. 242-3; *People v. Supervisors*, 68 id. 118, 119; *People v. Stephens*, 71 id. 527.) Prospective profits were properly allowed. (*Masterton v. The Mayor, etc., of Brooklyn*, 7 Hill, 61; *Devlin v. The Mayor, etc., of New York*, 63 N. Y. 25; *Clark v. Mayor, etc., of New York*, 4 Comst. 338; *Griffin v. Colver*, 16 N. Y. 489, 494-5; *U. S. v. Speed*, 8 Wall. 77, 84-5; *U. S. v. Smith*, 4 Otto, 214, 218; *Harvey v. U. S.*, 8 Ct. of Claims, 501; *Lord v. Thomas*, 64 N. Y. 107, 109.) The rule applicable to a claim of one individual against another for breach of contract has uniformly been observed as against bodies politic and corporate, whenever the question has arisen for adjudication. (*U. S. v. Smith*, 4 Otto, 217, 218; *U. S. v. Speed*, 8 Wall. 84, 85; *People v. Stephens*, 71 N. Y. 527, 549, 550.) The State has no sovereign power to invalidate

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its contracts, and its duty is no less imperative to observe the stipulation of its contracts than that of an individual. (U. S. Constitution, art. 1, § 10; *Dartmouth College v. Woodward*, 4 Wheat. 519; *Fletcher v. Peck*, 6 Cranch, 137; *State of New Jersey v. Wilson*, 7 id. 165; *Planters' B'k v. Sharp*, 6 How. [U. S.] 301.) The legislative power to abolish an office, and to reduce the salary or compensation of the incumbent, when not prohibited by the State Constitution has no application. (*Connor v. The City of New York*, 2 Sandf. 355; *S. C.*, 1 Seld. 285; *Butler v. Pennsylvania*, 10 How. [U. S.] 402; *People v. Vilas*, 63 N. Y. 459; *McVeany v. The Mayor*, 80 id. 185, 190.)

EARL, J. By the act chapter 427 of the Laws of 1870, the building of the State Reformatory at Elmira was provided for, and the governor was authorized to appoint five persons to act as a board of building commissioners, who were empowered to purchase the site and proceed with the erection of the buildings for the reformatory, and were charged with the general superintendence of the grounds and the design and construction of the buildings. Pursuant to the provisions of the act, the governor appointed five persons to act as such building commissioners, who afterward, in the year 1871, entered into several contracts relative to the work to be done by them, three with George W. Aldridge and three with John Kiley. These contracts were all let to the lowest bidders for the work and materials, and there was uncontradicted proof tending to show that they were fairly let and made upon terms then favorable to the State. After they were made, they were all, with the consent of the commissioners, assigned to George D. Lord and Charles A. Danolds, who proceeded to perform them. They continued in the performance of the contracts until the year 1874, having prior to that time done work and furnished materials under them, for which they had been paid a large sum, when by the act chapter 323 of the Laws of 1874, and the action taken thereunder, the further performance of their contracts was arrested. At that time they had on hand a

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large quantity of materials which they had not used, and there remained a large amount of work yet to be done before the completion of their contracts, the value of which, if done by them, would have amounted to several hundred thousand dollars.

Under the act of 1874 a superintending builder was appointed by the governor to take charge of the construction of the reformatory, and he refused to permit Lord and Danolds to complete their contracts, and he advertised for bidders and let the remaining work to other contractors, who completed the same. Thereafter Lord assigned all his interest in the contracts and in the claims against the State on account thereof to Danolds, who in 1878 presented a claim to the State board of audit for damages for breach of the contracts on the part of the State. The damages so claimed were mainly for prospective profits which the contractors would have made if they had been permitted to perform their contracts according to their terms and conditions. The claim was heard before the board of audit, and in April, 1879, it awarded to the claimant \$65,000. From this award under the act chapter 211 of the Laws of 1881, the attorney-general on behalf of the State appealed to the General Term of the Supreme Court, where the award was affirmed and then he appealed to this court. The attorney-general here asks for a reversal of the award upon several grounds which for convenience will be considered under separate heads.

First. He claims that the commissioners appointed and acting under the act of 1870 had no authority to make the contracts. Under that act they were to purchase the land for the site of the reformatory and take the deed therefor to the people of the State. Upon the site thus purchased the reformatory was to be constructed and it was to belong to the State. The State was to furnish the money for its construction, which they were fully authorized and empowered to expend. There was no limitation placed upon their powers and there was no specification in the act as to the manner in which they should proceed in the expenditure of the money or in the construction of the buildings. They were the selected agents of the State, clothed with all the power necessary and usual for the discharge

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of their duties. They could construct all the buildings under their own immediate supervision without letting contracts, or they could, as they did, let the entire work by contracts. We may take notice that it is usual for the State and for all public bodies to do work of this kind by contract; and that that method is the appropriate one for doing such work is recognized by the act of 1874, where it is specially provided that the reformatory should be completed by contract. There is, therefore, no plausible reason for saying that the building commissioners exceeded their powers in making these contracts. In making them they did not act for themselves but for the State, and the State became bound by them. That they were binding upon the State was recognized in the case of *Lord v. Thomas* (64 N. Y. 107).

Second. It is further claimed that these contracts contain provisions which defeat the claim for the prospective profits. One of the contracts contains this clause: "It is further mutually understood and agreed that, in case the execution of this contract shall be suspended by the parties of the second part at any time and for any cause, no claim for prospective profits on work not done shall be made or allowed; but the party of the first part shall have the right to complete the work when the party of the second part shall order it to be resumed;" and the other contracts contain provisions somewhat similar. These provisions did not authorize or contemplate the entire abrogation or repudiation of the contracts on the part of the State and an absolute arrest of the performance thereof. Then, too, if the language "the parties of the second part" found in these contracts is to be taken as meaning the building commissioners personally, it may be said that the execution of the contract was not suspended by them; but it was suspended by the act of 1874 and the action taken under that act. If by the parties of the second part the State was meant, then that provision cannot protect the State from liability for the prospective profits, because the contractors were denied the right to complete the work when it was resumed.

The contracts contain another provision substantially like this: Whenever the quantities of work, or any of them, shall in

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any respect be increased or diminished below "the amount or amounts exhibited at the time of letting this contract, the party of the first part hereby agrees to perform the work at the prices stipulated in this contract and to make no claim for damages in consequence of such increase or diminution." This provision gave no authority to the State to destroy the contracts, but simply provided for the case of a change of plan in consequence of which the work might be increased or diminished. Here the work, when the performance of the contracts by Lord and Danolds was arrested, was given under changed plans to other contractors, by whom it was completed.

There was another provision in one or more of the contracts as follows: "It is further understood that in the event of the suspension of the work mentioned in this contract for the period of six months, by reason of the legislature failing to make the necessary appropriations to carry on the same, the party of the second part shall direct the superintendent and engineer to make up an estimate and account to the time of such suspension and present them to the commissioners, who shall review them, and when correct and satisfactory, shall proceed, if in funds, to pay the same, including the percentage reserved up to the time of such suspension." Here there was not a case of suspension of the work within the meaning of this provision; but the contracts were entirely repudiated. This provision was intended simply to secure to the contractors full payment up to the time of suspension for all the work they had done, including the percentage reserved under the contracts, and nothing more.

It will be seen by a careful reading of the contracts that there is nothing in them which authorized the agents of the State to repudiate them or to absolutely arrest their performance without liability for damages. The contracts were binding upon the State; it could refuse to perform them on its part and arrest the performance of them by the contractors, but it could in no way destroy or get rid of the obligation of them, and so it was substantially held in the case of *Lord v. Thomas*.

Third. It is further claimed (and this claim presents the important question to be considered in this case) that the State

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cannot, like an individual, be made liable under such contracts for prospective profits. It is conceded that if these contracts had been executed between individuals, these prospective profits would have been proper items of damages to be recovered by the contractors, under the rules laid down in *Masterton v. The Mayor* (7 Hill, 61), and other like cases. But the claim is that the same rule does not apply to the sovereign when it enters into a contract; that it can repudiate its contracts and arrest their performance at any time with liability only for the fair value of the work done and materials furnished, and for actual damages, but not for prospective profits. We have given the careful consideration to this claim which its importance demands, without being able to give it our assent. The claim is certainly a novel one, having no support in reason and, so far as we can discover, in any reported case. The sovereign can contract and has very many occasions to do so; it can build canals and public buildings, and engage in public works, and in carrying forward its projects it makes use of the instrumentalities which individuals use for the same purposes. It must be governed by the same rules of common honesty and justice which bind individuals. It is for its interest that its contracts should be binding upon all the parties thereto. If it can at pleasure violate or abandon its contracts, in the absence of any stipulation authorizing it to do so, there will be such uncertainty and risk attending all its contracts that it will go into the market for work and materials at a great disadvantage. As was well said by Judge ALLEN, in *People v. Stephens* (71 N. Y. 549), "There is not one law for the sovereign and another for the subject, but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, whenever the contract in any form comes before the courts, the rights and obligation of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor." So far as is needful, the sovereign can protect itself against prospective profits by stipulations in its

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contracts, and in the absence of such stipulations it must be liable for such profits like individuals. To hold that the State could exact performance of a contract while it was advantageous to it, and absolutely arrest performance and escape liability when performance became disadvantageous, would shock the public conscience. It may happen, as is claimed in this case, that in the work actually done under such contracts there is a loss which may be made up by the further and complete performance of the contract. Can the State arrest the further performance, deny the prospective profits, and thus throw loss upon the contractor? It may be, too, as claimed in this case, that the contractors with a view to the performance of their contract, have sub-let much of the work and thus come under obligations to individuals. Can the State arrest the performance of the contract and deny the contractors prospective profits while they are left under obligation for such profits to the persons with whom they have contracted? Prospective profits in such a case stand in lieu of performance. They belong to the contractor; they are a valuable right, a chose in action, property, which belongs to him in every sense of the word. It cannot be doubted that if the legislature should in any special case enact a law which would specially and directly deprive the contractor of such prospective profits under an existing contract, the law would be unconstitutional, as impairing the obligation of contracts in violation of the Federal Constitution. It has been long settled so as to be beyond controversy, that the constitutional provision which denies to the State the power to pass laws impairing the obligation of contracts applies to all contracts made within its limits, as well contracts made by the State as those made by individuals. (*Dartmouth College v. Woodward*, 4 Wheat. 519; *Fletcher v. Peck*, 6 Cranch, 87, 137; *State of New Jersey v. Wilson*, 7 id. 164.) In *Fletcher v. Peck*, Chief Justice MARSHALL said: "If, under a fair construction of the Constitution, grants are comprised under the term 'contracts,' is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two indi-

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viduals but as excluding from the inhibition contracts made with itself? The words themselves contain no such distinction ; they are general and are applicable to contracts of every description." In *State of New Jersey v. Wilson*, the same learned judge said : "In the case of *Fletcher v. Peck* it was decided in this court, on solemn argument and much deliberation, that the provision of the Constitution extends to contracts to which a State is a party as well as to contracts between individuals."

These contracts were protected, not only under the constitutional provision referred to, but the right to these prospective profits, any advantage of value under them, was a species of property finding protection under both the Federal and State Constitutions, in the provisions that private property shall not be taken for public use without just compensation.

There is no common and universal usage in this State which denies the liability of the State for prospective profits which may be claimed under contracts made with it. It is matter of common knowledge that such profits have frequently been allowed and sanctioned by the legislature of this State. It has undoubtedly been usual in such contracts to provide against liability for prospective profits, and the very fact that such provision has been deemed necessary in such contracts evinces the understanding that but for such provision the liability would exist.

Under the act chapter 55 of the Laws of 1870, entitled "An act to abolish the contracting board and the system of repairing the canals by contract," contractors for repairs on the canals were authorized to surrender their contracts, and the canal board was also authorized to cancel such contracts ; but it was specially provided that, in a case of a surrender or cancellation of any contract, the contractors should not be entitled to demand or receive, and should not be allowed for any prospective damages or any compensation for any prospective or unearned profits. It is probable that in the contracts dealt with by that act there was a provision authorizing the canal officials, upon the terms specified in the contracts, to cancel them, and the fourth and fifth sections of that act were simply intended

to provide an equitable mode for a settlement and adjustment of the contracts when canceled or annulled. The fact that the legislature deemed it important to provide that no prospective profits should be allowed shows quite clearly that it supposed the State might otherwise be made liable for them.

To deny the right or power of the State to arrest the performance of its contracts without liability for prospective profits in no way impairs its sovereignty. It may repudiate its contracts, it may refuse to perform them, but its sovereign right to destroy or impair the obligation of them is limited by the Federal Constitution. It may refuse to respond in damages and leave a claimant without any remedy, as it may refuse to pay its bonds; but the obligation remains. No legislative *fiat* can destroy or impair that.

The doctrine contended for by the attorney-general finds no sanction in the decisions of the Federal courts. In *United States v. Speed* (8 Wall. 77), the war department, by its proper officers, entered into a contract with Speed to furnish fifty thousand hogs to be slaughtered at a stipulated price, and only a small quantity of the hogs were furnished, and Speed presented to the Court of Claims a claim for damages for a breach of the contract on the part of the government, and the Court of Claims held that the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deduction for the less time engaged and for release from the care, trouble, risk and responsibility attending performance of the whole contract. Upon appeal from the judgment of the Court of Claims to the Supreme Court of the United States, Mr. Justice MILLER, reading the opinion, approved the rule as laid down by the Court of Claims and said: "We do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than the one adopted by the court," and he cited the case of *Masterton v. The Mayor* (*supra*), as the leading case in this country on the subject. There was no intimation in that case by the counsel or court that a claim for prospective damages could not be made against the government.

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But the rule as applicable to such cases was sanctioned which is laid down in *Masterton v. The Mayor* as follows: "When one party to an executory contract puts an end to it by refusing to fulfill, the other party is entitled to an equivalent in damages for the gains or profits which he would have realized from performance." In *United States v. Smith* (4 Otto, 214), it was held that the United States was liable in the Court of Claims to a contractor who had agreed to supply the skilled labor and the materials for the erection of certain buildings for its use, for such damages as he actually sustained by reason of its improper suspension of the work. In that case the work was suspended for a time, but after the suspension the contractor was permitted to complete his contract. There was no hint in the case that a different rule was to be applied in the measure of damages in a case against the government from that applied in actions against individuals. In *Thompson's Case* (9 U. S. Court of Claims, 187), it was held, as stated in the head-note, that "where a contract obligates a quartermaster to receive one thousand mules within a specified period, but no consideration is expressed for the obligation, which is not reciprocal and does not bind the contractor, the contract is valid so far as the quartermaster suffers it to be performed; but the contractor cannot recover prospective damages on mules which he had not procured when the contract was renounced by the other party." The inference is very plain that if in that case the obligation of the contract had been reciprocal and had bound the contractor, his claim for prospective profits would have been allowed.

There are cases in the Court of Claims such as *Jones and Brown's Case* (1 Court of Claims, 383), and *Deming's Case* (id. 190), and *Wilson's Case* (11 id. 513), in which it has been broadly laid down that the government as a contractor cannot be held liable for the public acts of the government as the sovereign, and that whatever acts the government may do, be they legislative or executive, so long as they be public and general they cannot be deemed to alter, modify, obstruct or violate the particular contracts into which it entered with individuals and thus subject it to liability for damages to individuals. But if

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those cases, decided under a Constitution which does not prohibit the Federal government from impairing the obligation of its contracts, would otherwise be applicable to this case, here they can have no bearing as these contracts were violated by the particular act of 1874 and the authority expressly conferred by that act.

Nothing was decided adverse to the view we have expressed in the case of *McKee v. The United States* (12 Court of Claims, 504, and 7 Otto, 233). In that case in 1864 A. entered into two contracts with the United States to deliver a specified number of tons of hay at Fort Gibson and other points within the Indian Territory, which was then the theatre of hostilities, which contracts contained this clause: "It is expressly understood by the contracting parties hereto that sufficient guards and escorts shall be furnished by the government to protect the contractor while engaged in the fulfillment of this contract." He cut hay within that territory and payments were made to him for that which he delivered and for that which, with other personal property, had been destroyed by the enemy; and having been prevented by the enemy from there cutting all the hay necessary to fulfill his contract, he sued to recover an amount equal to the profits he would have made had the contract been fully performed, and he alleged the United States did not "furnish sufficient guards and escorts for his protection in the cutting and delivery of said hay;" and it was held in the Supreme Court that the contract was for the sale and delivery of hay and not for the cutting and hauling of grass; that the obligation of the United States to A. was not that of an insurer against any loss he might sustain from hostile forces, but it was to protect his person and property while engaged in the effort to perform his contract, and that A. was entitled to the full value of the property actually lost by him, and having been paid therefor, his petition should be dismissed. It is thus seen that that case turns entirely upon the construction of the contracts there under consideration, and no claim was made therein by any one that the same rule as to damages did not apply to the government which applies to individual contractors.

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In the case of *The Apollon* 9 (Wheat. 362), it was held that the probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages in case of marine torts. There is no suggestion in the case that the same rule would not be applied against the government which would be applied in actions against individuals. The rule laid down was said to be founded in public policy, and also to be adopted as most conducive to justice in such cases, certain and easy of application and preventive of expensive litigation.

In *Jones v. Judd* (4 N. Y. 411) the rule as to prospective profits laid down in *Masterton v. The Mayor* is fully recognized and reiterated, and that case gives no support to the contention on the part of the State in this case. A law of a general and public character, rendering it impossible for an individual to perform his contract, may excuse performance. But a law can never be upheld or have any effect, the special purpose of which is to annul or impair contracts.

I now repeat that it has never been decided in any case in this country that has come to my knowledge, and it has never been said by any judge so far as I can find, that the sovereign cannot be made liable for prospective profits when it has arrested the performance of its contracts precisely as individuals could be made liable for such profits.

The damages claimed here are, within the meaning of the law, actual damages; they are not speculative, remote, contingent or uncertain; they are capable of very precise estimation. The moment these contracts were signed, being valid and binding upon both parties, whatever value was in them belonged to the contractors; and when by the act of the State the contractors were deprived of that value, they suffered actual damages, for which upon general principles of law and justice they should receive indemnity.

The State board of audit was constituted by the act chapter 444 of the Laws of 1876. By section 2 of that act the board was to hear all private claims and accounts against the State excepting such as were required to be heard by the canal appraisers, and to "determine on the justice and amount thereof

and to allow such sums as it shall consider should equitably be paid by the State to the claimants." Under this statute, without reference to the general principles above discussed, it cannot be doubted that it would be the duty of the board of audit in all cases to allow to the claimant against the State what would be just and equitable, if the claim were made against an individual. Even if, as contended for by the attorney-general, the State would not ordinarily be liable for prospective profits upon the same rule that would make individuals liable, it could be subjected to such liability by an act of its legislature; and by this act it is clear that it was intended to allow to claimants against the State the same measure of relief and justice as could be awarded if the claim were presented against individuals. The act established a court to administer justice between the State and its creditors, and it cannot be supposed that the State intended one measure of justice for such creditors, while another measure of justice was administered in its other courts in litigations between its citizens. This award was, therefore, in any view authorized by the board of audit.

By the act chapter 211 of the Laws of 1881, an appeal was authorized to the General Term, and jurisdiction was conferred upon that court to decide, adjudicate and determine the action between the claimant and the State upon both the law and the facts "as shall be equitable and just," and thus the General Term was clothed with the same power possessed by the board of audit; and who can say that it was not equitable and just for the General Term to adopt the same measure of damages between the claimant and the State as would be applied in litigations between individuals? We cannot say, therefore, that there was any error of law in the decisions made by the board of audit and the General Term.

We do not understand that there is any contention that any error was committed upon the facts. We must take these contracts as we find them; they may have been extravagant; but there is no proof that they were, or that they were founded in fraud or collusion. No proof whatever was adduced on the

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part of the State, and the proof on the part of the claimant showed that his damages were about \$100,000, and it is impossible for us to say that the allowance of \$65,000 was not entirely just and equitable.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., who took no part.

Judgment affirmed.

FRANCIS SWIFT, Claimant, etc., Respondent, v. THE STATE OF
NEW YORK, Appellant.

The commissioners appointed under the act of 1866 (Chap. 751, Laws of 1866), "in relation to quarantine in the port of New York," under the power given in said act to award the contract for the work therein provided for to the person who should "offer to erect the same for the lowest sum," advertised for proposals, giving notice that the successful bidder "must furnish all the material necessary to complete the entire work" according to the plans and specifications. Also, that if the commissioners required any alterations in plans or mode of construction, the value of the same must be agreed upon "before such alteration is made." Claimant sent in proposals, stating that he had examined the plans, specifications and form of contract, and would contract to build the structure in the manner and on the conditions specified therein, upon prices named separately for each kind of work, the prices named "to cover the expense of furnishing all the necessary materials and labor, and the performance of all work set forth." These proposals were accepted and a contract entered into, by which the advertisement, proposals, plans and specifications were declared to form part thereof, and claimant agreed to construct and fully complete the work, the State to pay therefor the sum of \$252,491.68, which was stated to be the aggregate cost of the construction at the prices specified in the proposals, to be paid in installments of \$20,000 each, on certificates of the engineer that the work performed and material furnished up to the time of giving the certificate amounted to at least fifteen per cent more than the amount of that and prior installments, the last installment to be paid when the entire work was "fully completed." *Held*, that the contract provided for a completed work at the fixed sum named; the intent being to prevent the necessity of measurements and computations after it was executed; and that plaintiff's legal rights were limited to the contract-price, save as to alterations provided for.

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The contract authorized alterations to be made, and it was provided that "if such alterations increase the amount of the work, such increase shall be paid for only according to the quantity actually done and at the prices fixed in such proposal for similar work," to be determined by the engineer; after the completion of the work, the engineer gave a certificate of that fact, also stating that certain alterations had been made, which increased the amount of work in the sum of \$12,851.77. Plaintiff, knowing the contents of the certificate, received by virtue thereof the balance unpaid of the sum specified in the contract, and the sum specified in the certificate for the additional work, giving a receipt, stating that it was "in payment of the balance due him." Plaintiff presented a claim to the board of audit for a further sum which was allowed. There was no claim or evidence of error or mistake on the part of claimant in giving the receipt. On appeal as authorized by the act of 1881 (Chap. 211, Laws of 1881), *held*, that the claimant was not entitled to a further sum under or by virtue of the contract; that the adjustment by the engineer with the knowledge of the claimant and the receipt by him as a final payment concluded him from making a further demand against the State; also, that there was no moral consideration upon which the claim could be based.

The State engineer and surveyor was required by resolution of the legislature to make a survey and estimate of the amount of work done under the contract; said engineer made a report, stating in substance, that his deputy had made the survey and estimate required. The deputy testified that in making measurements to distinguish between work done under this contract and a subsequent contract relating to the same matter, he received his data entirely from one H. and that the computation was not based upon exact measurements; it appeared that it was impossible to distinguish between the work done under the two contracts. Upon this estimate and information received from others, the engineer reported the work done by claimant, at the prices specified, amounted to \$39,375.12 in excess of what he had received. The claim and allowance was for this excess. *Held*, that the question before the board was to be determined upon common-law evidence; that the report of the engineer was no evidence, and there was nothing to sustain the allowance. (State Const. art. 3, §§ 19, 24.)

Swift v. The State (26 Hun, 508), reversed.

(Argued April 14, 1882; decided April 25 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department entered upon an order made February 13, 1882, which affirmed an award of the State board of audit, in favor of Francis Swift, for \$39,375.12. (Reported below, 26 Hun, 508.)

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The claim presented to the board of audit alleged "that in or about the month of August, 1868, he, said claimant, made and entered into a contract with the State of New York for the erection, on the west bank in the lower bay of New York, of a structure for quarantine purposes, under and in pursuance of the act of the legislature of the State of New York, entitled "An act in relation to quarantine in the port of New York, and providing for the construction of the permanent quarantine establishment," passed April 21, 1866 (chap. 751 of the Laws of 1866).

That all and singular the conditions precedent in and by said act provided were, as this claimant is informed and believes, and upon his information and belief avers, duly performed and complied with." * * *

"That he proceeded with the work under said contract diligently and in good faith, and in all things duly performed the same, and all the covenants and agreements therein, on his part expressed, duly kept and fulfilled.

"And the statement of the claimant further shows: That from natural causes, against or for which human foresight was unable to provide, there was necessarily, and without any fault of claimant, consumed in and about the erection of said structure a larger quantity of materials than had been provided for in the original estimates.

"That all such additional consumption of materials was made under the immediate direction and superintendence and pursuant to the directions of the engineer of the State, in charge of said work.

"That the entire structure was completed on or about the 1st day of January, 1871, and the State accepted same, and entered into occupancy thereof on or about said day, and is now, and ever since the said last-mentioned day has remained in occupancy thereof.

"That on the 7th day of May, 1872, the honorable the assembly of this State passed the following resolution:

"*Resolved*, That the State engineer and surveyor be, and he is hereby required to make a survey and estimate of the num-

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ber of cubic yards of crib-work, stone, sand and other materials built, filled in, and furnished in the construction of Quarantine island No. 2, in the lower bay of New York, under contract of August 10, 1868, between the quarantine contracting board and Francis Swift, and report the same to the assembly.

“That in pursuance of said resolution, the then State engineer and surveyor made the survey and estimate therein required, and made the report thereof to the assembly. * * *

“That the total amount which this claimant, according to the report of said State engineer and surveyor, became entitled to receive from the said State, for and on account of the erection of the said structure, was \$304,218.57.

“That upon account of such sum there has been paid this claimant, by the State, the sum of \$264,843.45, and there now remains legally and equitably due the claimant from the State, in the premises, over and above all payments and offsets, the just and full sum of \$39,375.12, with interest from the 1st day of January, 1871.”

The material portions of the contract and the facts are substantially set forth in the opinion.

Leslie W. Russell, attorney-general, for appellant. The board of audit erred in admitting in evidence the report of the State engineer and surveyor, made in pursuance of the resolution of the assembly in 1872, against the objection of the attorney-general. (*Seavey v. Seavey*, 37 N. H. 125.) The estimate made up was without authority, and of no force whatever as evidence of the liability against the State upon a trial conducted upon principles of the common law. (*B'd of Water Commrs. v. Lansing*, 45 N. Y. 10.) There was an acceptance and settlement as to extra compensation within the rules pertaining to such cases, binding upon both parties, and neither can the State recover it back nor can the claimant recover a sum beyond that amount. (*Herrick v. Ames*, 1 Keyes, 190; *McIntyre v. Warren*, 3 id. 185.) The furnishing of more material than was contemplated does not give the contractor the right to claim extra compensation, but the same comes within the aggregate price

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of the original contract. (*Collyer v. Collins*, 17 Abb. Pr. 467.)

Wm. N. Dykman for respondent. In this court this "appeal shall be governed by all the rules and practice now regulating appeals to the Court of Appeals. (Laws of 1881, chap. 211, § 3; *Field v. Munson*, 47 N. Y. 221; *Vermilyea v. Palmer*, 52 id. 476.) The report of the State engineer to the assembly was competent. It is at least *prima facie* proof of its assertion. (Code of Civil Procedure, § 933; 1 Greenleaf on Evidence, §§ 482-3, 491; *Miles v. Stevens*, 3 Penn. St. 41; *People v. Denison*, 17 Wend. 312; *Gurno v. Janis*, 6 Mo. 330; 3 Cold. [Penn.] 306; *Hayward v. Bath*, 38 N. H. 179; *Seavey v. Seavey*, 37 id. 125.) Respondent's recovery is not repugnant to the Constitution. (Report of Committee on Powers of Legislature, Proceedings and Debates, vol. 2, p. 1173; *People v. Dennison*, 8 Abb. N. C. 133.) The Constitution created a forum wherein the subject could establish that morally the sovereign ought to allow his claim. (Laws of 1876, chap. 444; Proceedings and Debates, Convention 1869; Remarks of Mr. Kernan, vol. 2, p. 1340.) The determination of the State board is "final," unless appealed from, and the appeal is to the courts. (Laws of 1881, chap. 211, § 2; Proceedings and Debates, Convention 1867, vol. 2, p. 1173.)

DANFORTH, J. We think this appeal was well taken. The subject-matter of the claim submitted to the board of audit was materials furnished and work done by the claimant in the erection of a certain structure on the west bank in the lower bay of New York, to be used for quarantine purposes. Its erection was authorized by the legislature in 1866. (Chap. 751, Laws of 1866.) By that act commissioners were appointed, whose duty it was, among other things, to prepare specifications of the work and materials necessary for the erection of the structure, make an accurate estimate of the entire expense (§ 3), advertise for proposals for its construction, and award the contract to the person who should "offer to erect the same for the lowest sum," and give security for the faithful and com-

plete performance of the contract. They accordingly appointed an engineer (Ritch), adopted plans and specifications, showing with the greatest detail the particulars of the dimensions, the arrangement and mode of construction for every portion of the desired work, and notified persons seeking the contract that the successful bidder must "furnish all the material and labor necessary to complete the entire works as described in the specification and shown in the plans." It was also provided that if the board of commissioners should require any alterations to be made in the plans or mode of construction during the progress of the construction of the works, it must not be made without an order from the engineer, and the value of the same must be agreed upon "before such alteration is made." It was required that the price should be affixed to each separate portion or item of the work, in the manner stated in the specifications. As the work when completed would constitute the exterior walls of an artificial island, it was required to be crib work, built in blocks, in part sunk to a designated line, and to be filled up to the top with stone at the time they were sunk. Upon these, other cribs were to be placed, and so a continuous wall erected. Each crib was required to be filled to within six inches of the top with stone, the space inside the wall to be filled with sand; and the exterior was to be protected with "rip-rap," or stone arranged as stated in the specification. So much is important as bearing upon the claim before us.

The claimant responded to the advertisement in writing, stating that he had examined the specifications and form of contract, the locality in which the work was to be constructed, and the plans of the same, and that he would "contract to build the structure therein mentioned of the dimensions, in the manner, and on the conditions required by the specifications and form of contract annexed" thereto, upon prices named separately for each kind of material, adding, "the prices above named are to cover the expense of furnishing all the necessary materials and labor, and the performance of all work set forth in the agreement and specifications." His proposition was accepted and the agreement referred to executed by the con-

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tractor and the commissioners on the 19th of August, 1868. Its preamble narrates the act of 1866, the advertisement for proposals, the proposals, which are declared to be annexed to the contract and to form part of it, the award of the contract to the claimant, and thereupon, he agrees, in consideration of the sum agreed to be paid to him by the State, "that he will provide all the necessary materials and labor for, and erect, construct and complete" the said structure "according to the plans and specifications therefor prepared by" said Ritch — referring to them by date and place of filing — "and which," he says, "are to be taken as a part of this agreement as if specifically incorporated therein." It provides that the structure shall be erected under the direction of an engineer selected by the State, and "be fully completed according to said plans and specifications" at a time named.

The State, on its part, agrees that if the contractor performs on his part, it "will pay to him the sum of \$252,491.68," "being," in the language of the contract, "the aggregate cost of the construction of the structure at the prices specified in said proposals," to be paid by installments of \$20,000, upon the certificate of the engineer that the work performed and the material furnished up to the time the certificate is given, has been performed according to the plans and specifications, and materials furnished at least fifteen per cent in excess of the amount of the respective installments, and the last installment shall be paid when the said engineer shall certify that the said exterior wall and foundation have been in all respects fully completed according to the terms of the contract.

These stipulations furnish a persuasive guide to the intention of the parties. The installment is a sum named, and not graduated by the amount of work done or materials furnished; but the payment is not to be made until the cost of work and materials furnished exceeds the installments by at least fifteen per cent, no matter how much more the excess; and the last installment is to be paid, not according to the cost of work or materials furnished — it has no reference to that — but when the work shall have been in all respects "fully completed."

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It is evident from all the provisions above referred to that the purpose of the parties was to provide for a completed work at a sum named, and to prevent the necessity of measurements and computations after the contract was executed, by requiring the contractor to inspect, at the beginning, plans and specifications of the entire work, and adjust his price accordingly. If this precaution required justification, its wisdom would appear by reading the evidence given to the board of audit by witnesses who came after the contractor, and whose conjectures, judgments and opinions indicate the difficulty, if not the impossibility, of furnishing satisfactory testimony by measurements, after the fact, of materials really furnished. Of the two methods — estimates before the work, and conjectures after — the parties chose the former. It was fair to do so. Moreover, as it is plain from the words of the contract already quoted that this was the understanding of the contractor, so it further appears from other provisions of the same instrument, requiring the work under the specifications to be done to the satisfaction of the engineer, the materials to be subject to his inspection and rejection, and the contractor “to complete any of the provisions of said specifications according to his directions and explanations.”

A complete work was embraced within the plans, proposals and specifications, and nothing less was contemplated by the statute, which required a fixed sum as the price of construction. Experience gained during the construction might require changes, and for those, provision was made, not only as we have already seen, by the specifications, but also by the contract. Its ninth article declares “that if the State, or its engineer, shall, during the progress of the work, deem it necessary to make any alteration in the plan or mode of construction, they shall have power to make the same * * * and if such alterations increase the amount of the work, such increase shall be paid for only according to the quantity actually done and at the price fixed in such proposals for similar work under this contract.”

It thus appears that the scheme involved, first, a work exe-

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cuted according to plans and specifications, at a fixed price; second, extra or additional work and materials if made necessary by changes in the contract plan, to be paid for at prices already ascertained. Both parts of this scheme are covered or provided for by the contract. Work went on under it to a conclusion; the structure was finished. On the 28th of December, 1870, the contractor obtained from the engineer (Ritch) a writing which contains, we think, a full and satisfactory answer to the claim now made. Referring to the statute (Laws of 1866, chap. 751, *supra*), the engineer certifies that Swift, the contractor, "has completed the structure agreed to be constructed by him by his contract bearing date, August 18, 1868." He then states that soon after the commencement of the work, a portion of the fabric was displaced and carried away; that in consequence thereof it became necessary to change the plan of the structure, at the base, and that pursuant to the provisions of the ninth article of said contract, he did thereupon change the same, and deemed it necessary in the progress of the work to further change the plan of the structure in a manner which he specifies, and then says, "by such changes the contractor was obliged to perform labor and furnish materials to a considerable amount over and above what he would have been required to perform and furnish had said work been constructed wholly in accordance with the original plan and specifications referred to in said contract; that said contractor has now fully completed his contract according to said plans and specifications as thus modified, and that the work performed, and the materials furnished, in all respects, conformed to said modified plan and said specifications; *that from measurements made by me during the progress of the work and since its completion, I have ascertained the quantity* of materials furnished and the amount of labor performed in excess of what would have been required had no changes been made in said plan, and I have computed the amount which the said contractor is entitled to receive for said extra work and materials, according to the provisions of said ninth article, and the same amounts to the sum of \$12,351.77. I do therefore certify that in my judgment the

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said contractor is now entitled to receive the balance due him upon the original contract-price of said work, and also said sum of \$12,351.77 for said extra work and materials."

It is not only apparent that the contractor was a party to this certificate, knowing its entire contents but there are provisions in the agreement which show that he must have been an active as well as a silent witness to its correctness. By one of the articles of the agreement, he was required to give his personal attention to the faithful prosecution of the work, and by another it is declared that before he should be entitled to receive either of the installments, or any payment, he must produce to the engineer satisfactory evidence that all persons who had done work, or furnished materials under the agreement had been fully paid. The fact of such information need not be dwelt upon, for neither mistake nor ignorance is pretended.

On the strength of the certificate he received from the board of commissioners a draft, dated December 30, 1870, payable to his own order, addressed to the comptroller of the State, for the sum of \$44,843.45, "in payment," as the recital is, "of the balance due him" upon his contract for the erection of the structure in question. It was accompanied by a certificate signed by the president of the board, and addressed to the comptroller, certifying "that the amount of the annexed draft is to be applied to the payment of the said balance," according to the terms of his contract aforesaid, and that the said draft is given upon the certificate of the engineer, above referred to. The draft and the two certificates were attached together, and the contractor, or his indorsee, presented the same for payment and received it as early at least as the 11th of January, 1871, for on that day the draft indorsed by Swift, and the accompanying certificates were surrendered to the comptroller. It further appears from the contractor's verified statement of claim presented to the board of audit that he admits the receipt from the State of the sum of \$264,843.45, on account of the erection of the structure, and as this sum equals the contract-price of \$252,491.68, and the sum of \$12,351.77 allowed for extra work, it may be implied that it is made up of those two

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sums. It is, therefore, very difficult to see how any claim could be sustained for a further sum on account of the matters referred to in the contract.

But, nevertheless, the claimant has been allowed the further sum of \$39,375.12. What is his case? It is obvious from his statement of it that the work and materials for which he asks payment came under the agreement. He recites the contract and makes it part of his statement. Then he avers, "that he proceeded with the work under said contract diligently and in good faith, and in all things duly performed the same, and all the covenants and agreements therein, on his part expressed, duly kept and fulfilled;" and further, "that from natural causes, against or for which human foresight was unable to provide, there was necessarily, and without any fault of claimant, consumed in and about the erection of said structure a larger quantity of materials than had been provided for in the original estimates; that all such additional consumption of materials was made under the immediate direction and superintendence, and pursuant to the directions of the engineer of the State, in charge of said work; that the entire structure was completed on or about the 1st day of January, 1871, and the State accepted same, and entered into occupancy thereof on or about said day, and is now, and ever since the said last-mentioned day has remained in occupancy thereof."

It seems plain, from the facts already stated, that there can be no merits in such a claim. The contract provided for a completed work at a fixed price, and for extra work and materials made necessary by the very causes which in this statement are put forth as the reason for departing from its limitations. It also provided for a determination by the engineer in charge as to the extra work and materials necessary; and his adjustment made with the knowledge of the claimant of the amount of extra work and materials and the sum due therefor, and the receipt of that sum by the claimant as a final payment of his account concludes him from making any further demand against the State. It is not necessary to deny that such a transaction might be open to explanation, and that as between individuals,

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so against the State, an error or mistake could be alleged as ground for opening the settlement. But nothing of that kind is pretended, and full legal effect must be given to it, and the adjustment between the parties be deemed final.

The learned counsel for the respondent, however, contends that the claim can stand upon the moral consideration growing out of the fact that the State received more than it has paid for. In this is error, both of fact and law. *First*, he claims that the engineer in charge changed the plan and thereby increased the quantities of materials and work. This is conceded; but he further assumes that the increased quantities "put in place under the supervision of the engineer entitled the contractor to \$39,375.12 in addition to the sum of \$12,351.77. Of this there is no evidence. Indeed the claimant seems to have intentionally avoided such an allegation. Instead of showing by his own averment or by his own testimony the fact which, if it existed, must have been for reasons already stated within his own knowledge, he refers to the report of W. B. Taylor, the State engineer, in office in 1873, and says, "according to that he became entitled to receive, on account of the erection of the structure, \$304,218.57," that he received in all only \$264,843.-45, and claims the difference between these sums, viz., \$39,375.12, not, therefore, on account of extras, but the entire contract.

Yet the report of the engineer to which he refers is, neither as evidence or information, of the least value. He was "required by resolution of the assembly to make a survey and estimate of the number of cubic yards of crib work, stone, sand and other materials built, filled in and furnished in the construction" of the work, under contract of August, 1868. It appears that the duty enjoined upon him was not performed in person, and his answer to the inquiry is, by its very terms, the result of information communicated to him by others. He says, "I visited the island, examined the work, and instructed my deputy, John A. Cooper, who accompanied me, to make the necessary survey and estimate." The report states, "during the progress of construction repeated delays and damages were

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sustained by the contractor, and consequently much varying testimony as to the nature and extent of his claims was presented for consideration."

It is obvious that no part of this declaration was called for by the inquiry; but the report itself, based as it is upon information derived from others and upon an estimate not made by the engineer in person, could under no circumstances be considered as evidence of any fact therein stated. Nor was it intended to be the basis of any legal claim; before the board of audit the claimant was himself a witness; he proved the execution of the contract, established the fact that the State took possession of the structure in January, 1871, and continued in possession. He goes no further; speaks neither of the quantity of materials required by the contract, or furnished in the execution of the work described in it, nor of any extra materials furnished. Upon both questions he is silent.

In his behalf, however, was examined John A. Cooper and Charles R. Haswell. Cooper was deputy State engineer from the 1st of January, 1873, until the 1st of January, 1874. He testifies that he went with Taylor to the island, with the assistance of Haswell, made measurements, received his data entirely from Haswell, for the purpose of distinguishing between work performed under the contract, and a subsequent contract relating to the same matter. He says, "upon those measurements the report of Taylor was made." He is asked by the claimant's counsel this question, "I wish you would state whether that report of the State engineer upon the basis of your measurement was a fair and faithful computation of the quantities that had been put upon the island by Swift?" Answers. "Yes; as mathematically correct as I could make it."

It appears from his testimony that the State engineer was not present at any time while measurements were being taken. Changes at that time had occurred in the structure through settlement, and the extent of these changes he got at approximately. When asked how near to accuracy he could come, replies, "It depends upon the ability to approximate; some men could not approximate within a hundred feet, and it

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depends upon training — it is a question of training altogether.” Asked, “I want to find out how near it was so as to be a basis of measurement?” Answers, “you have to use the best of your judgment backed by the best of your experience in the case.” Asked, “tell us how you got at it to tell the amount the structure had settled?” Answers, “by taking these different datas and using my judgment as to how much the island had settled at different places, I can approximate within five per cent of any thing.” Asked, “then the result you arrived at was not based upon computation of exact measurement?” Answers, “no, it could not be.” Asked, “then you had to speculate somewhat?” Answers, “more or less.” Asked, “did you make up the report?” Answers, “no, sir; Mr. Taylor did.” Asked, “you furnished him with the basis?” Answers, “no, sir; he overlooked my work; these plans and computations were made in Albany.” Asked, “did you examine any witnesses?” Answers, “no, sir.” Asked, “did you take any testimony down there?” Answers, “not under oath.” Asked, “did you take any not under oath?” Answers, “yes, sir.” Asked, “whom did you examine?” Answers, “different ones connected with it; I had to take conflicting statements in regard to it.” Asked, “who were the different persons you examined?” Answers, “parties connected with the work.” Asked, “you made allowance for settling?” Answers, “yes.” Asked, “you made that upon what you call just and equitable principles?” Answers, “as near as I could bring them; I had a consultation with the State engineer with reference to it; the State engineer’s decision controlled mine; we thought with all the evidence I could get, that that would be a just and equitable arrangement to allow a settlement of two courses.” Asked, “you examined parties in the way of witnesses, but they were not sworn?” Answers, “yes.”

Mr. Haswell testifies that in February or March, 1871, he was appointed by the quarantine commissioners an engineer and architect in charge of the work; that Swift was then in the process of fulfilling a later contract of 1870, for additional stone. Prior to that time he had filled the contract of 1868.

He recollects Cooper, the preceding witness, making measurements and that he pointed out to him what quantities of stone delivered under the contract of 1870 were to be taken out from the measurements. He says, he never computed data and details of the measurements, but these computations were correctly and scientifically made.

The witness shows that it was impossible to distinguish between stone furnished under the two contracts; but being asked if he could tell the difference approximately, answered, "I could tell it sufficiently to satisfy my sense of duty." Being asked by counsel to state what portion was under water as near as he could guess at it, answered, "I cannot give you an estimate of it here, but I can give you a diagram to show you how it was got at." Asked, "you made no computation yourself that went into the report?" Answered, "no, sir; I was not called upon to do it."

Now it is impossible to say that the testimony of this witness either verifies the report submitted by the State engineer, or contains material from which an award could be made.

The question before the board of audit was to be answered by them upon common-law evidence, and according to rules of law which would have been applicable to the adjustment of a similar claim arising between individuals. Only in this way could it comply with the duty imposed by statute, "to administer oaths and take testimony in relation thereto," and so "determine the justice and amount" of the alleged claim. (Laws of 1876, chap. 444; Laws of 1881, chap. 211, § 3), that it might "be audited or allowed according to law." Such claims only as had been so dealt with could be paid or allowed by the legislature. (Constitution, art. 3, §§ 19, 24, as amended in 1874.) There is here neither legal evidence to sustain the claim, nor moral considerations which might make its denial an apparent hardship, and on the other hand there is a defense, both in law and equity, to the benefit of which the State is entitled.

The judgment appealed from should, therefore, be reversed, and although we discover no ground on which the claimant

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can recover upon the case presented by him, we grant a new hearing before the board of audit in accordance with our practice on appeals from other tribunals. (Laws of 1881, chap. 211.)

Judgment reversed and new hearing ordered, with costs to abide the event.

All concur, except RAPALLO, J., not voting ; ANDREWS, Ch. J., concurring in result

Judgment reversed.

In the Matter of the Petition of STEPHEN UPSON to Vacate an Assessment.

The omission to file a map in accordance with the provision of the act of 1870 (§ 2, chap. 626, Laws of 1870), requiring the department of public parks in the city of New York to cause to be made maps and plans of the streets laid out, altered, etc., is not a substantial or vital error rendering an assessment for a change of grade of an existing and established street invalid ; the filing of the map is not an indispensable prerequisite to the establishment of a new grade, but simply a matter of form, a mere irregularity which furnishes no ground for vacating or setting aside the assessment.

The title of the act of 1872 (Chap. 872, Laws of 1872), entitled " An act in relation to the Croton aqueduct and other public works in the city of New York," sufficiently states the subject of the act, and so it is not obnoxious to the provision of the State Constitution (art. 8, § 16), requiring the subject of a local or private bill to be expressed in its title.

In 1859 a contract was awarded to one McG. to regulate and grade a certain portion of Fifth avenue. It provided that, in case the grade should be changed during the progress of the work, the contractor was to conform to the altered grade at the contract-prices, so far as applicable ; this contract was not completed until in 1875, several months previous to which time a new contract was made with E. to regulate and grade, in accordance with a new grade, under an ordinance of the common council, passed in 1874. If the work had been done under the contract of McG. the expense would have been much less. *Held*, that, as it did not appear that there was any such difference or change made as rendered the first contract inapplicable, or that it could not have been enforced, the parties assessed were entitled to the benefit of the reduced prices ; that the error,

Statement of case.

however, furnished no ground for vacating the assessment entirely, but simply for a reduction.

In re Upson (Mem., 24 Hun, 650), reversed.

(Argued October 18, 1881; decided January 17, 1882.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 28, 1881, which affirmed an order of Special Term denying an application to vacate an assessment on certain lots in the city of New York, owned by the petitioner, for regulating, grading, etc., Fifth avenue, from Ninetieth to One Hundred and Twentieth streets. (Mem. of decision below, 24 Hun, 650.)

The facts are sufficiently stated in the opinion.

Charles E. Miller for appellant. Chapter 872 of the Laws of 1872 does not express its subject in its title, and is unconstitutional. (Const., art. 8, § 16.) The powers and functions of the department of public parks are not in any manner described by the words "public works" as used in the title of said act. (*Town of Fishkill v. Plankroad Co.*, 22 Barb. 634; *People v. Hill*, 35 N. Y. 449; *Baldwin v. Mayor*, 2 Keyes, 387, 392; *People v. O'Brien*, 38 N. Y. 193; *Smith v. Mayor*, 7 Robt. 190; *Pullman v. Mayor*, 54 Barb. 169; *Gaskin v. Meek*, 42 N. Y. 186; *People v. Comm'rs of Highways of Town of Palantine*, 53 Barb. 70; *People v. Allen*, 3 Hand, 404, 417; *People, ex rel. Lee, v. B'd of Sup'v'rs of Chautauqua Co.*, 4 id. 10; *People, ex rel. Pratt, v. Com. Council of Brooklyn*, 13 Abb. [N. S.] 121; *People v. Briggs*, 50 N. Y. 553; *Huber v. People*, 49 id. 132; *In re Sackett, etc., Sts.*, 74 id. 95.)

J. A. Beall for respondent. The grade at which the street was worked was lawfully established. (Chap. 88, Laws of 1787, § 4; chap. 129, Laws of 1801, § 11; chap. 86, 2 R. L. 1813, § 175; chap. 52, Laws of 1852, §§ 1, 2; chap. 626, Laws of 1870; chap. 872, Laws of 1872, § 7.) The subject of the act of 1872 (Chap. 872) is sufficiently expressed in its title. (*In re Mayor*, 50 N. Y. 504.) Where the title of a local or private act expresses a general purpose or object, all

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matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title. (*City of Rochester v. Briggs*, 50 N. Y. 553; *In re Van Antwerp*, 56 id. 261-7; *Nuendorff v. Duryea*, 69 id. 557; *In re Metropolitan Gas-light Co.* [not yet reported]; *Gloversville v. Howell*, 70 N. Y. 287; *Harris v. The People*, 59 id. 599; *People v. Banks*, 67 id. 568.) The corporation had the power to assent to the variation or modification of the contract, and its assent to such variance may be implied. (Dillon on Corporations, § 451; *Messinger v. Buffalo*, 21 N. Y. 196.) The city is entitled to the presumption that the act of the authorities was valid. (*In re Bassford*, 50 N. Y. 509.) If the variation or modification of the McGrane contract was unlawful, it does not call for or authorize the vacation of the assessment, but presents a proper case for the reduction thereof in proportion to the unlawful increase. (*In re St. Joseph's Asylum*, 69 N. Y. 383; *In re Hebrew Orphan Asylum*, 70 id. 476; *In re Auchmuty*, 18 Hun, 324; *In re Merriam*, Ct. of Appeals, MSS.) The objection that the map filed by the commissioner of public works, and which made the second change of grade, did not include the entire district of the city covered by the act of 1870, is an objection merely to the form in which the change was made, and is for that reason untenable. (Laws of 1874, chap. 313; *In re Marsh* [not yet reported]; *In re Pinckney* [not yet reported]; *In re Cruger*, 84 N. Y. 619; *In re Mayor*, 50 id. 504; Laws of 1872, chap. 580.)

MILLER, J. The petitioner seeks to avoid the assessment which is the subject of consideration upon two grounds:

First. That the work was illegally done, the avenue having been previously regulated and graded to the grade established in 1853, and such grade never having been legally changed.

Second. That when the contract for this work was entered into there was an outstanding contract, by the terms of which the contractor was bound to do his work at much less price

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than those actually paid, making a difference in cost of over \$48,000.

The expenses for which the assessment was made were for changing the grade of Fifth avenue, between Ninetieth and One Hundred and Twentieth streets. The work was done by virtue of an ordinance of the common council passed July 25, 1874, under a contract with one Everard. The avenue had previously been regulated and graded to the grade established by the common council in the month of December, 1853, in pursuance of an ordinance for regulating and grading said avenue from Eighty-sixth street to Mount Morris square, and the contract was awarded to one John McGrane in 1859. Under chapter 52, Laws of 1852, provision is made by section 1, that the grade now fixed and established by the common council, south of Sixty-third street, and which shall hereafter be fixed and established, north of Sixty-second street, shall not be changed or altered except as hereinafter provided. By section 2, whenever an application shall be made to the common council to change or alter the grade of any street, and the common council shall deem it expedient to do so, notice is to be given as provided before it shall be lawful for the common council to act upon the application, and it is declared that it shall not be lawful for the common council to alter or change the grade of any street within the limits provided by section 1 without the written consent of two-thirds of the owners in lineal feet fronting on each side of the street or avenue, etc. Further provision is made for the assessment of loss or damage and for the payment of the same. No such consent or notice was ever given as required by the act of 1852. The grade, the expense of which is the subject of assessment, was originally established by the commissioners of the Central Park by virtue of chapter 697 of the Laws of 1867 and by the commissioners of public works claiming to possess power to establish grades by virtue of chapter 626 of the Laws of 1870 and chapter 872 of the Laws of 1872.

The appellant's counsel claims that no such power existed under the act of 1870 or the act of 1872 (*supra*), and that under

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the act of 1870 this could not be done until the commissioners had made and filed a map showing streets laid out and retained by them, and that this was preliminary to the establishment of such grade. It, therefore, becomes important to inquire and determine from whence the authority is derived and the nature of the provisions of the various acts which have been cited, relating to or bearing upon the subject. The act of 1867 (*supra*, § 1), authorized the board of commissioners of the Central park to lay out and establish streets, etc., to designate and direct what part or parts of any streets * * * now laid out shall be abandoned and closed, and also to widen any streets "now laid out; also to alter and amend the present grade of any street, * * * that may be retained by them, and to establish new grades for all other streets; * * * that may be laid out and established or retained by them," within a certain territory which was specified. Section 2 provides among other things that the "said commissioners shall in all cases of laying out streets, etc., and in the establishment of grades thereof and of pier and bulk-head lines which they are authorized and directed by law to lay out or establish, cause to be made two similar maps or plans showing the streets, * * * which they shall lay out or retain as aforesaid, showing the width, extent and location of the same, and also two similar maps or plans, showing the grades that shall be amended or established by them for the streets," etc., so laid out or retained by them, and said maps or plans when so made shall be certified by one of the officers of the board of commissioners, etc., "one of said maps showing the width," etc., "and one of said maps showing the grades so amended or established shall be filed and remain of record in the office of the street commissioner of said city, and the others shall remain of record in the office of said commissioners of the Central park."

The avenue upon which the lot assessed was located, from Ninetieth up to One Hundred and Eleventh street, is included within the limits named in the act of 1867, and covered by it.

By chapter 626, Sessions Laws of 1870 (*supra*, § 1), the department of public parks were declared to have and possess

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exclusive power to lay out and establish a street or avenue called the "Eastern boulevard," and other streets or avenues to connect with the same, "and also to alter, amend and establish the grades of such new streets; and *alter or amend* the present grade of any street, avenue, or road that may be *retained by them*" within the limits of certain territory which was specified. The second section makes the same provision as that contained in the act of 1867, as to the making and filing of maps, and plans showing the streets established and retained. By the act of 1872 (*supra*, § 7), it is declared as follows: "The department of public works shall have and possess all the powers and functions heretofore and now possessed by the department of public parks in relation to the boulevard (road or public drive), streets, avenues, and roads above Fifty-ninth street, not embraced within the limits of any park or public place, and all provisions of law conferring powers and devolving duties upon the department of public parks in relation thereto are hereby transferred to and conferred upon the said department of public works." The grade which is now assailed as invalid was duly established by the commissioners, and such grade and the assessment for conforming to the same have been held by this court to be valid. (*In re Walter*, 83 N. Y. 538.)

Upon the hearing, evidence was introduced from records of the commissioners of public works of a map entitled "map and profile," showing the grades of the streets and avenues within the district therein named, including Fifth avenue between One Hundred and Eighth and One Hundred and Nineteenth streets, as changed and established under the act of 1870, and act of 1872; with red lines and figures showing grades as changed and established, and black lines and figures showing old grades. Appended to the map was a certificate of the commissioner, stating that he had changed and established the grades of certain streets, which were named "as shown on this map and profile, and that this map and profile shows the grades of said streets and avenues as so changed and established." A certificate of the comptroller and treasurer of the park, at-

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tached to a map and profile, was also offered in evidence; it states that the map was one of two similar maps or profiles made by the commissioners of Central park by virtue of the powers conferred by the act of 1867, and that they show the grade of Fifth avenue between Ninety-seventh and One Hundred and Ninth streets. The proof also showed that no map or plan had been filed, or was made under authority of the act of 1870, and that the grade to which the street was regulated under the contract with which the present assessment is concerned is coincident with the grade laid down upon the two maps introduced in evidence upon the hearing.

Without considering the question whether there was a substantial compliance with the act of 1870, and after a careful examination of the different statutes which have been cited, we are brought to the conclusion that the omission to file a map in accordance with the provisions of the second section of the act of 1870 was not a substantial or vital error which rendered the assessment invalid. The statute is not prohibitory, and does not provide that no work shall be done before a map is filed, and we think that the filing of the map was not an indispensable preliminary requisite to the establishment of a grade. The streets are established according to law, and cannot be changed or abolished by a mere failure to file a map showing that they are retained. A map showing the retention of an existing and established street is a matter of form and not of substance. It is not a condition precedent which it is absolutely essential should be performed before the work can lawfully be done, or an assessment made to pay for the same. At most, the neglect to file the map is an omission of the officers to perform a duty, and comply with or to carry out the details of a law, and was a mere irregularity which, it is provided, expressly furnishes no ground for vacating or setting aside an assessment. (See chap. 313, S. L. of 1874.)

The failure to file the map required not being jurisdictional, we think that the objection urged and considered furnishes no sufficient ground for vacating the assessment.

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We also think that the title of the act of 1872 sufficiently states the subject and is not within the inhibition of section 16, article 3 of the Constitution. The opinion of the General Term by DANIELS, J., fully covers this point, and an extended discussion is not demanded. (See, also, *In re One Hundred and Thirty-eighth Street*, MSS. Op.*)

Although the assessment was valid, we are unable to see any reason why the work was not done in accordance with the contract which had previously been made with one John McGrane in 1859, which provided that, in case the grade should be changed on the Fifth avenue or the adjoining streets during the progress of the work, the contractor was to conform to the altered grade at the prices in the contract so far as applicable. This contract was not completed until 1875, and the contract under which the assessment was laid was made several months previously. The expense was much less under the McGrane contract, and no reason is apparent why the parties assessed should not have the benefit arising from such reduced prices.

Why this contract could not have been enforced is not shown, and there is no such difference manifest or any such change of grade as authorizes the conclusion that it had no application. This error, however, furnishes no ground for vacating the assessment entirely, and as the amount, if any, which should be deducted can be determined, the orders should be reversed and a new hearing should be ordered at Special Term for that purpose, with costs to abide the event.

All concur.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
THE BROOKLYN, FLATBUSH and CONEY ISLAND RAILWAY
COMPANY, Respondent.

The provisions of the Railroad Acts (§ 1, chap. 282, Laws of 1854; § 1, chap. 469, Laws of 1873; § 1, chap. 710, Laws of 1873) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad corporation, to organize a new corporation for the purposes of the transfer, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case where there is no such existing corporation.

It is not essential for the purchasing company to file a map of the line thus acquired where it is already constructed.

The provision of the State Constitution (Art. 3, § 18) prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws.

Accordingly, *held*, that said provision did not affect the provision of the Railroad Act of 1839 (§ 1, chap. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations "for the use of their respective roads; and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision.

The provisions of the Railroad Act of 1850 (Chap. 140, Laws of 1850) were not rendered inoperative as to railroads running "over, under, through or across streets, by the Rapid Transit Act, so called (Chap. 606, Laws of 1875), as by the latter act, it is declared that it "shall not be construed to repeal or in any manner to affect" the former.

By defendant's charter, its terminus in Brooklyn was "at or near Atlantic avenue;" its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. It acquired the right to run its cars upon the tracks of the L. I. Co. whose road was constructed along the center of the avenue, and tracks were constructed by the L. I. Co. connecting those of the two roads; similar curved tracks had long been used by the L. I. Co. to reach its depot south of the avenue and for other purposes. The L. I. Co., by its charter, had the right to build such appendages as it deemed necessary, and branches when land was offered without expense. *Held*, that by defendant's charter its terminus was not necessarily south of the avenue, and there was nothing therein to prevent it from making such terminus in the center thereof where it could connect with the other road; that the connecting tracks were

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| 89 | 75 |
| 111 | 34 |
| 111 | 49 |
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| 111 | 47 |
| 111 | 67 |
| 89 | 75 |
| 117 | 193 |
| 89 | 75 |
| 143 | 70 |
| 89 | 75 |
| f 157 | 458 |
| 157 | 468 |
| j 157 | 476 |

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authorized by the charters of the two companies, and the provision of the act of 1850 (§ 28, subd. 6), authorizing railroad companies to connect their roads, and in no respect could they be considered as a separate and independent line, and so requiring all the steps necessary to a newly-organized street railway.

The map required to be filed by a railroad company is sufficient if it shows the alignment and profile; it is not essential that it should show all the connections, turnouts and switches.

At the time of the passage of the act of 1859 (Chap. 484, Laws of 1859), providing, among other things, for the relinquishment by the L. I. Co. of the right to use steam power within the city of Brooklyn, it was rightfully running its trains by steam through Atlantic avenue. In pursuance of that act it relinquished such right in consideration of a payment made to it, which was assessed upon property benefited, and the road was thereafter operated by horse power until 1876, when the common council of said city passed a resolution, authorizing the use of steam in drawing cars on said avenue, and the legislature passed an act (Chap. 187, Laws of 1876) authorizing such use by the L. I. Co., and immediately thereafter the use of steam power was resumed. In 1879 defendant under its contract ran its cars on the avenue in the same way. *Held*, that the act of 1876 removed the restriction, leaving the original charter power of the L. I. Co. in full force; that it had the right to determine what motive power should be used, both as to its own cars, and as to others which it could lawfully permit to come upon its road; and as, by its lease to defendant, the latter was authorized to use steam power, it could lawfully use it to run its cars on the avenue.

Also *held*, that said act of 1876 was not violative of the provision of the State Constitution (Art. 3, § 18) which prohibits the passage of any private or local bill granting "any exclusive privilege, immunity or franchise whatever."

Also *held*, that the question, whether said act was violative of the constitutional prohibition against legislation impairing the obligation of contracts, could not be presented in actions brought by the State against defendants to which the assessed land-owners, who alone had such contract rights, if any existed, were not parties.

It is the duty of this court to determine a constitutional question only when it is directly and necessarily involved in the issue to be determined.

It seems that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained.

The attorney-general, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights.

(Argued April 10, 1882; decided May 2, 1882.)

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon an order dismissing the complaint on trial.

The nature of the action and the material facts are stated in the opinion.

W. C. Trull for appellant. The only franchise acquired by the Coney Island and East River Company was the franchise to construct and operate a road between Atlantic avenue and Coney Island upon the line designated upon its map of location. It could not lawfully abandon any portion of its line or route. (*People v. Vt. R. R. Co.*, 24 N. Y. 267; *People v. Tubbs*, 49 id. 356; *Webb v. Forty-second Street, M. & S. R. R. Co.*, N. Y. Daily Register, February 12, 1881.) The agreement of consolidation being void, the defendant has never been incorporated and has never acquired the franchise, or right to construct or operate a railroad on Atlantic avenue, or elsewhere. (*Matter of B. W. & N. R. W. Co.*, 72 N. Y. 245.) Defendant's chartered rights were limited to the construction and operation of a railroad between the southerly line of Atlantic avenue and Coney Island. As soon as it crossed the line of Atlantic avenue, it overstepped the bounds and limits of its franchise. (*People v. Vt. R. R. Co.*, 24 N. Y. 267; *Thomas v. W. J. R. R. Co.*, U. S. Sup. Ct., 21 Alb. L. J. 409; *Presd't U. B. Co. v. T. & L. R. R. Co.*, 7 Lans. 246.) The act of the defendant in constructing the steam railway in Atlantic avenue was unauthorized, in that it was done without obtaining the consent of the common council of the city of Brooklyn. (Laws of 1850, chap. 140, § 28, subd. 5; Laws of 1864, chap. 582, § 1; Laws of 1854, chap. 140, §§ 1, 2; Laws of 1871, chap. 560, § 1; Laws of 1873, chap. 863, p. 1377, § 23.) The fact that the defendant has never obtained the consent required by the Constitution is conclusive against its right to construct or operate a railroad on Atlantic avenue. (Const., art. 3, § 18; Laws of 1854, chap. 141, § 1; Laws of 1860, chap. 10, § 1; Laws of 1873, chap. 863, p. 1377, § 23; Laws

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of 1839, chap. 218, § 1; *In the Matter of Oliver Lee & Co. Bank*, 21 N. Y. 12; *People, ex rel. v. Trustees of Fort Edward*, 70 id. 28; *Falconer v. B. & J. R. R. Co.*, 69 id. 491; Laws of 1875, chap. 606, § 4.) It is not competent for a railroad corporation to lease its road to an individual. (*Woodruff v. Erie R. R. Co.*, 13 N. Y. Weekly Dig., No. 7, Nov. 1881, p. 162; *Abbott v. Johnstown, G. & K. R. R. Co.*, 9 N. Y. Weekly Dig. 545; 80 N. Y. 27.) The sole right acquired by Mr. Richardson as purchaser of the franchises and privileges of the Brooklyn and Jamaica Railroad Company was to associate with himself, as such purchaser, other persons, and to acknowledge and file articles of association as prescribed by statute. (Laws of 1854, chap. 282, § 1; Laws of 1873, chap. 469, § 1; chap. 710, § 1; Laws of 1874, chap. 430; Laws of 1876, chap. 440; Laws of 1869, chap. 917, § 9; Laws of 1875, chap. 108.) The lease from the Atlantic Avenue Railroad Company to the Long Island Railroad Company is void upon its face as being against public policy. (1 Redfield on Railways [5th ed.], 617; *T. & R. R. R. Co. v. Kerr*, 17 Barb. 601; *Copeland v. Citizens' Gas Co.*, 61 id. 60; *Wood v. Truckee Co.*, 24 Cal. 274; *Thomas v. W. J. R. R. Co.*, 11 Otto, 71; *Abbott v. J. G. & K. R. R. Co.*, 9 N. Y. Weekly Dig. 545; 80 N. Y. 27; Laws of 1839, chap. 218, § 1.) The act of 1876, which grants the right to use steam power upon Atlantic avenue, is unconstitutional. (Const., art. 3, § 18; Laws of 1876, chap. 187, p. 166; *Matter of Gilbert El. Ry. Co.*, 70 N. Y. 370.) The act of 1876 is also invalid, in that it impairs the obligation of the contract by which the Brooklyn and Jamaica and Long Island companies agreed not to use or permit the use of steam upon Atlantic avenue. (U. S. Const., art. 1, § 10; Laws of 1859, chap. 444, § 6; Laws of 1859, chap. 484, § 9; Laws of 1860, chap. 92, § 7; chap. 100, § 2; chap. 460, § 4; Laws of 1873, chap. 432, § 2.) The grant of the right to use steam upon Atlantic avenue, as contained in the act of 1876, even if it be a valid law, is by the express terms of the grant limited to the corporations therein named, and is not assignable. (*Blackwell v. Wiswell*, 14 How.

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Pr. 257; *Harding v. The St'mb't Munich*, 5 Law Rep. 106; *Mendenshall v. Klinch*, 51 N. Y. 246.) If, for any of the reasons heretofore advanced on the part of the plaintiff, the act of the defendant in constructing and operating a steam railway upon Atlantic avenue be unlawful, then those acts constitute a nuisance and should be enjoined by this court. (*Davis v. The Mayor*, 14 N. Y. 514, 525; *People v. Kerr*, 27 id. 193; *Fowler v. Saunders*, Cro. James, 446; *King v. Russell*, 6 East, 427; *Rex v. Carlisle*, 6 C. & P. 636; *Rex v. Cross*, 3 Camp. 226; *Rex v. Jones*, id. 230; *Rex v. Moore*, 3 B. & A. 184; *Comm. v. Passmore*, 1 S. & R. 219; *Rex v. Ward*, 4 Ad. & El. 334; *People v. Cunningham*, 1 Denio, 524; *Hart v. The Mayor*, 9 Wend. 571; 2 Story's Eq., §§ 921, 922; *Atty.-Gen. v. Cohoes Co.*, 6 Paige, 133; *Raines v. Baker*, Amb. 158; *Samson v. Smith*, 8 Sim. 272; *Spencer v. L. & B. R. R. Co.*, id. 193; *Att'y-Gen. v. Richards*, 2 Anst. 603; *Corning v. Lowerre*, 6 Johns. Ch. 439.) The commissioners were not officers or agents of the State, but were officers of the court by whom they were appointed, and were not acting solely in the interest of the State, but in the interest of the property-owners upon whose application they were appointed. (Laws of 1859, chap. 481, § 1; *Beard v. City of Brooklyn*, 31 Barb. 149; *McCullough v. Mayor*, 23 Wend. 459; *Lake v. Trustees of Williamsburgh*, 4 Denio, 523; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *University v. People*, 99 U. S. 309; *State Bk. of Ohio v. Knoop*, 16 How. 369; *New Jersey v. Wilson*, 7 Cranch, 164.) There cannot be an extra allowance where the subject-matter is a mere right, not involving any claim of property, *e. g.*, a suit for an injunction. (*People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Atlantic Dock Co. v. Libbey*, 45 id. 499; *Grissler v. Stuyvesant*, 67 Barb. 81.) Even if it be conceded that the State was a party to the contract, it by no means follows that it could abrogate it. (*Hall v. Wisconsin*, 103 U. S. 5, 11; *Walker v. Whitehead*, 16 Wall. 314, 317.) The position taken that it is beyond the scope and power of the legislature to abridge its legislative powers by contract is untenable. (*Keith v. Clark*, 97 U. S. 474;

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Murray v. Charleston, 95 id. 444; *New Jersey v. Yard*, id. 104; *Harrington v. Tennessee*, id. 679; *Humphrey v. Pegues*, 16 Wall. 244; *Wilmington R. R. Co. v. Reid*, 13 id. 264; *Home of the Friendless v. Rouse*, 8 id. 430; *McGee v. Mathis*, 4 id. 143; *Jefferson B'k v. Skelby*, 1 Black, 436; *Dodge v. Woolsey*, 18 How. [U. S.] 331; *Gordon v. Appeal Tax Court* [3 How.], 15 Curtis, 338.) The provision of the contract prohibiting the use of steam was authorized by the act of 1860, which preceded it, and also validated by the subsequent legislation, which confirmed the contract and recognized it as in force. (Laws of 1873, chap. 432, § 2; *Brown v. Mayor*, 63 N. Y. 239.) There is no force in the contention that treating the contract in question as a simple relinquishment of the right to use steam on the avenue, the companies were at liberty to resume the use of steam at pleasure, if the legislature so authorized. (*Fletcher v. Peck* [6 Cranch], 2 Curtis, 337.) The provision of the act of 1860 (Chap. 460), making the contract binding upon any corporation using the road, and the act of 1859 (Chap. 484, § 6), prohibiting the use of steam and repealing all laws authorizing its use by either of the companies, amount to a covenant upon the part of the State that it would not thereafter restore the right to use steam. (*Binghamton Bridge*, 3 Wall. 51, 81; *Bridge Proprietors v. Hoboken Co.*, 1 id. 116.) The constitutional provision prohibiting a State from passing a law impairing the obligations of contracts equally prohibits a State from enforcing, as a law, an enactment of that character, from whatever source originating. (*Williams v. Bluffy*, 96 U. S. 184; *Farrington v. Tennessee*, 95 id. 682.) The burden of proof is on the defendant to show its right to maintain and operate a railroad upon Atlantic avenue, and to use steam power thereon. (*People v. Utica Ins. Co.*, 15 Johns. 387; Angell and Ames on Corporations, § 756; High on Ex. Rem., § 652; *People v. Thatcher*, 55 N. Y. 528.)

E. B. Hinsdale & William C. De Witt for respondent. The defendant's incorporation and the consolidation of the two former corporations leading thereto were, in all respects,

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valid. (Laws of 1869, chap. 917; *Hentz v. L. I. R. R. Co.*, 3 Barb. 646; *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302; Pierce on Railroads, 254.) The defendant had a lawful right to cross the southerly sidewalk and half of Atlantic avenue, to the old railroad bed of the Long Island Railroad Company, in the center of that avenue. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Walton v. Lift*, 14 Barb. 216.) Aside from constitutional questions, the use of defendant's cars upon Atlantic avenue, under the contract with the Long Island Railroad Company, was authorized by law. (*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *Blossburgh & C. R. R. Co. v. Tioga R. R. Co.*, 1 Abb. Ct. of App. Dec. 149; *Parker v. R. & S. R. R. Co.*, 16 Barb. 315.) The act of 1876 restoring the use of steam power upon the old railroad bed of Atlantic avenue by the corporation in possession thereof, or its lessees, was constitutional and valid. (*Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; *Matter of Binghamton Bridge Co.*, 3 Wall. 51; reversing 27 N. Y. 87; *B. & L. R. R. v. S. & L. R. R.*, 2 Gray, 1; *Mohawk Bridge Co. v. Utica R. R.*, 6 Paige, 554; *C. R. Bridge Co. v. Warren Bridge Co.*, 11 Peters, 420; *Richmond R. R. Co. v. L. R. R. Co.*, 13 How. [U. S.] 71; *People v. Bowen*, 30 Barb. 27; *B. & N. Y. R. R. v. Dudley*, 14 N. Y. 366; *Saratoga P. R. Co. v. Thatcher*, 11 id. 102; *Matter of N. Y. El. R. R.*, 70 id. 327; *Rogers v. Bradshaw*, 20 Johns. 735; *Jerome v. Ross*, 7 Johns. Ch. 315-342; *Newton v. Comm'rs of Mahoning*, 100 U. S. 548; *People v. L. I. R. R. Co.*, 9 Abb. N. C. 181.) The contract made with the commissioners under the act of 1859 did not operate to prohibit the future use of steam power at any time thereafter when the legislature should see fit to grant the right. (*Newton v. Comm'rs of Mahoning*, 100 U. S. 548; *Presbyterian Church v. New York*, 5 Cow. 538; *Britton v. The Mayor*, 21 How. Pr. 251; *Matter of Oliver Lee*, 21 N. Y. 9; Cooley on Const. Lim., § 340, etc.) A railroad lawfully in a public street is not a nuisance. (*Kellinger v. Forty-second Street R. R. Co.*, 50 N. Y. 206; *People v. Kerr*, 27 id. 188; *Wager v.*

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T. U. R. R. Co., 25 id. 526; *In re Prospect Park & C. I. R. R. Co.*, 8 Hun, 30.)

FINCH, J. The questions argued in this case are numerous and important, but are not all within a just construction of the issue raised by the pleading. The action was brought by the State, through its attorney-general, against the defendant corporation, to restrain it from running its cars and locomotives along and upon Atlantic avenue in the city of Brooklyn. The defendant is sued by its corporate name; it is sought to be enjoined as a corporation; and its existence as such is nowhere in the complaint denied. Its right to run its cars from Atlantic avenue to Brighton Beach is not questioned or challenged; and while its origin, as the product of a consolidation, is stated, and the lines of the two absorbed companies, as laid down on their respective maps, are alleged to have been parallel and competitive, yet the corporate existence of the defendant is assumed, and the fair scope and purpose of the action is not to assail its existence and adjudge its usurpation of corporate rights, but to keep it within its chartered limits and the boundaries of its franchise. If there are defects in its organization, it will be time enough to consider them when the rights which it exercises are in some form directly menaced. The investigation, therefore, will be narrowed to two questions, viz.: Whether the defendant has the right to run its trains on Atlantic avenue at all; and, if it has, whether it is at liberty to operate them by steam.

What was known as the Brooklyn and Jamaica Railroad Company was organized in 1832 (Chap. 256), and was authorized to construct and maintain a railroad with a single or double track, "and with such appendages as may be deemed necessary for the convenient use of the same," from any eligible point in the village of Brooklyn to any point within the village of Jamaica, and also of constructing and using a single or double lateral railroad, southward to the then village of Flatbush, and northward to Flushing. It was further provided that it should make use of no street or lane, nor run with steam power within the village limits, without the permission of the

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corporate authorities of Brooklyn first had and obtained. The company constructed its road, and began its operation in 1835. It obtained by purchase or condemnation a right of way, eighty feet wide, upon and along what has since become a part of Atlantic avenue, in the city of Brooklyn, and operated its road with steam, presumably with the consent of the village authorities.

In 1834 the Long Island Railroad Company was chartered (Chap. 178) and authorized to build a single or double track, with such appendages as it deemed necessary, from a point in or near Greenport through the middle of Long Island to the water's edge in the village of Brooklyn, at a point to be designated by its trustees, and to prescribe "by what force the carriages to be used thereon may be propelled," but was put under a condition, as in the case of the prior company, not to use any street or lane, or run with steam power in Brooklyn without the previous permission of its trustees. This road obtained the permission and was operated by steam. In 1836 (Chap. 94) the Brooklyn and Jamaica Company was authorized to lease or sell its road to the Long Island Company, and appears to have made such lease at about that date, which was surrendered in 1860 and renewed at some time in 1867. The Long Island Company was further authorized in 1839 (Chap. 277), to build any branch railroads, "in any part of Long Island," as it should deem expedient and necessary, in cases where the land-holders offered the land required free of expense.

In 1853 (Chap. 220) an act of the legislature provided that every railroad company on Long Island, whose road had been constructed and was in use, should have the right to propel its cars with "the like motive power" as that then employed, upon condition that the strip of land on the south side of Atlantic avenue, between Gowanus lane and Clason avenue, should be ceded to the city of Brooklyn for a public street, by the Brooklyn and Jamaica Company, which owned the same, and both parties were authorized to contract accordingly. In 1855 that agreement was made, both companies joining in it, and the city, in exchange for the land received by it, giving to the

railroads a right of way thirty feet wide through the center of Atlantic avenue, and the full right and authority to operate their roads by steam.

It is entirely clear, therefore, that at the date of this contract, each of the two companies by force of their charters, by the assent of the village and the city of Brooklyn, and by the contract with the latter made under legislative sanction, had acquired and possessed the right to operate their roads with steam power upon and along Atlantic avenue in Brooklyn. It remains to see how the defendant became a sharer in that right.

In 1855 the Brooklyn and Jamaica Company mortgaged its property and franchises in the usual form. That mortgage was foreclosed, and, upon the sale ordered by the court, all the property and franchises mortgaged were purchased by William Richardson, who thereafter, and in 1874, conveyed all his rights to the Atlantic Avenue Railroad Company. This corporation was already in existence, having filed its articles of association under the General Railroad Act on the 1st day of May, 1872, and its route including Atlantic avenue and other streets of the city. It is claimed that this conveyance was inoperative on the ground that under the statute the purchaser could only associate with himself other persons and so form a new corporation to which the property and franchises could be transferred. That is a plain misconstruction of the act. (Laws of 1854, chap. 282, § 1; Laws of 1873, chap. 469, § 1, and chap. 710, § 1.) Before these acts were passed, such a railroad mortgage, while it certainly covered the special and peculiar franchises of the company, could with difficulty be construed to cover its corporate life, or right to be a corporation, and the subject created doubts. That right, it was argued, could scarcely be said to pass to a purchaser by virtue of his purchase, and could only be given by the authority of the State. Unless, therefore, the purchaser could find some corporate body in existence, capable of holding and exercising the franchises purchased, he stood in the awkward predicament of owning a property which it was not certain he could either use or sell. It was to cure this difficulty that the act of 1854 and its subsequent amendments

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were designed. In the absence of an existing corporation, capable of taking and exercising the franchises sold, the purchaser was authorized to create a new corporation for the purposes of the transfer, but whose corporate life came from the grant and authority of the State. It is quite evident that this authority was intended only to meet a possible emergency, and not at all to prevent a sale or transfer to a corporation already existing, and capable under the law of its creation of holding the property and exercising the franchises which passed to the purchaser by the mortgage sale. We think, therefore, that the deed of Richardson was operative to convey to the Atlantic Avenue Company, all the property and rights of the mortgagor except barely the corporate life of the latter; and that the omission of the purchasing company to file a map of its line thus acquired was of no consequence, since it bought a road already constructed and in existence.

In 1877 the Atlantic Avenue Company leased all that portion of its road from near Flatbush avenue to the city line to the Long Island Company, and in 1879 both companies joined in a contract with the defendant by which the latter was authorized to operate its trains over the road of the former on Atlantic avenue. The right of the defendant, as derived from such two companies, to run its cars over Atlantic avenue, is entirely plain, if its contract was valid, and if it had or acquired the right to make the necessary connection by crossing the south line of the avenue. Both of these propositions are here in dispute.

The invalidity of the contract is put mainly upon two grounds, each of which aims to modify if not repeal the provisions of the act of 1839 (Chap. 218, § 1) by the authority of which the contract was made. That act made it lawful for any railroad corporation to contract with any other railroad corporation "for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed by said contract." It is argued that the constitutional provision of 1875 (Art. 3, § 18) is a restriction upon legislative power, and applies to the act of 1839, and forbids a contract under it

for running through the streets of a city without first obtaining the prescribed consents. But the prohibition invoked is one against future legislation, and has no reference to previously existing laws. It commands the legislature not to "pass" a private or local bill, for certain specified purposes, and ordains that those purposes shall be accomplished through the aid of general laws, and then restrains their range by a further condition, that even by a general law the legislature shall not authorize "the construction or operation of a street railroad" except in certain cases. The whole scope of the section is to dictate to the law-making power what it may or may not do thereafter, what bills it may pass and what it shall not, and not at all to affect or act upon past legislation which at the time was entirely lawful. We have heretofore declared this doctrine so plainly as to make unnecessary a more detailed discussion. (*In the Matter of the Gilbert Elevated Railway Co.*, 70 N. Y. 361.) But it is further claimed that under the act of 1875, known as the Rapid Transit Act, the defendant could not acquire the right by contract or otherwise to operate a railroad along or upon the city streets and avenues, except in accordance with the terms and conditions of that act, and that the latter is so repugnant to and inconsistent with the provisions of the general act of 1850, as to make it plain that the latter is no longer in force as to railroads running "over, under, through or across" streets, avenues and places. But the Rapid Transit Act expressly provides that it "shall not be construed to repeal or in any manner affect chapter 140 of the Laws of 1850," etc. It is our duty to obey the mandate and not undertake to construe the act in a manner which the legislature has forbidden. We entertain no doubt, therefore, that the contract of the defendant with the two companies occupying Atlantic avenue was valid, and gave it the right to run its cars upon that avenue.

But the question now comes whether it could get there, and whether its connection with the other roads was lawful? Its main line approached the avenue nearly at right angles. By its charter its terminus in Brooklyn was "at or near Atlantic

avenue." Its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. To reach the tracks in that highway and connect with it, what is called in railroad parlance a "Y" was built. A double track curving to the westward was laid across the south line of the avenue and joined to the tracks in its center, and a similar curve at the east united with the avenue rails in that direction. These connecting tracks were built by the Long Island Company, but paid for by the defendant, and were laid in pursuance of the contract between the two companies, and for the purpose of making their arrangement effectual. Similar tracks had long existed before, though not in the same precise place, which had been used by the Long Island Company as a means of reaching its depot south of the avenue, and for purposes of handling freight. On this state of facts it is insisted on behalf of the appellant that these connecting curves constitute a new, separate and independent railroad, which could not be laid across or upon the avenue without all the steps and conditions applicable to a newly-organized street railway.

Our first inquiry then is, whether these connecting curves are a separate and independent line, or a part of the authorized and chartered line of the defendant on the one hand, or the Long Island road on the other? Under its charter, the northern terminus of the defendant's line was "at or near Atlantic avenue," and the question raised is, whether by force of that phraseology its terminus was necessarily south of the avenue, or might be adopted at any point within it? In the case of *The Farmers' Turnpike Co. v. Coventry* (10 Johns. 389), the words "to the city of Hudson" were held not to terminate the road at the bounds of the city, but carried it within the city limits, and that such words must have a reasonable interpretation. In the *Mohawk Bridge Co. v. The Utica & Schenectady Railroad Co.* (6 Paige, 554), the words "at or near" the city of Schenectady were held to give the right to enter the city limits. The *chancellor* said that the word "at," when it precedes the name of a place and denotes situation, frequently means the same as *in* or *within*. And in *Mason v. Brooklyn City & Newtown*

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R. R. Co. (35 Barb. 377), the words "to terminate *at* Newtown," were held not to stop the road at its boundary, but to permit it to pass within. Of course the circumstances of a particular case must affect the construction, but we see nothing in the facts before us to indicate that the charter was intended to prevent the company from crossing the south line of the street, and making its terminus in the center where it could connect with another line. The fact that its line as mapped stopped short of that point is not conclusive. The same fact existed in the case last above cited, and the court held that, while the map was decisive on a question of route, it could not work a change of the termini, or an abandonment of a portion of the authorized road. In the present case even the appellant would be obliged to concede that notwithstanding the map filed the defendant could build the omitted twelve feet. If it could do that it could go to the center of the avenue if the language of the charter permitted. The map required to be filed is intended mainly for the purpose of acquiring property necessary to be taken, and is sufficient if it shows the alignment and profile without showing all the connections, turnouts and switches. But the Long Island road had a right to cross the south line of the avenue. It had done so for years. By its charter it had the right to build such appendages as it deemed necessary, and even branches where the land was offered without expense. It built these curves for a purpose consistent with its business and because deemed necessary to its successful conduct, and with the consent of adjoining land-holders. These facts taken in connection with the provisions of the act of 1850 which give the right to any company "to intersect, join and unite its railroad with any other railroad before constructed, at any point upon its route, and upon the grounds of such other company, with the necessary turn-outs, sidings, and switches and other conveniences in furtherance of the objects of its connection" (Laws of 1850, chap. 140, § 28, sub-div. 6), seem to us to make it our duty to hold that these curves were authorized by the charters of the companies, and were in no just sense or respect a separate and independent road. As a consequence the objections founded upon that idea,

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that the curves were in excess of defendant's charter, that the common council did not consent, that a map of the curves was not filed, that their construction was prohibited by the charter of 1873, and that the constitutional consents were not given, seem to us without force and inapplicable to the real situation. In reaching this conclusion we have not overlooked what are claimed to be the alleged admissions in the answer. It would be an unreasonable and too rigid construction to hold that they related to the terminus of the line instead of to its general route.

The question which remains is the most important of all. It is, whether the defendant is entitled to run its trains on Atlantic avenue by steam power? Whether that question is fairly in the case has occasioned us not a little of doubt and hesitation. It would not be an unreasonable construction of the complaint that it challenged only the defendant's right to run on Atlantic avenue; but as another construction is possible, and the question of motive power has been very fully and ably argued on both sides, we have thought it best to meet it.

In 1859 the Brooklyn and Jamaica Company and the Long Island Company were running their trains up and along Atlantic avenue rightfully, and with the full authority and consent of the State and the city. In that year the legislature passed an act (Laws of 1859, chap. 484) to provide for the closing of the tunnel of the Long Island Railroad Company, in Atlantic street, and for the relinquishment by said company of its right to use steam power within the city of Brooklyn. The act authorized the common council, upon the petition of a majority of land-owners within the district of proposed assessment, to apply to the Supreme Court for the appointment of three commissioners, who should be empowered to contract with the Long Island Company and the Brooklyn and Jamaica Railroad Company, to relinquish the use of steam within the city limits, in consideration of a payment not exceeding \$125,000, which sum was to be raised by assessment upon property benefited, within a certain specified area. The act provided, that upon the confirmation of the report of the commissioners, the right of the two

companies to use steam power within the city limits should end, and repealed, as of that date, all laws conferring such right. The contract was made accordingly, the assessment levied and the money collected and paid, and the right to use steam surrendered. The road was thereafter operated by horse power until 1876, a period of about sixteen years. In that year came a change of purpose. The common council of Brooklyn, on the thirteenth of March, passed a resolution permitting and authorizing the use and operation of steam, and steam locomotives and cars on Atlantic avenue, between Flatbush avenue and the city line, by the Atlantic Avenue Railroad Company, or any railroad company acquiring, by lease or otherwise, the right so to use and operate the railroad on such avenue. In the succeeding month the legislature enacted that it should be lawful for the Atlantic Avenue Company, and the Long Island Company as its lessee, to run cars over the road on the avenue, from the city line to Flatbush avenue by steam power, subject to such rules and regulations as the city of Brooklyn might prescribe. Immediately after the passage of this act the Atlantic Avenue road resumed the use of steam power, and in 1877 the Long Island Company re-laid the track with heavier rail and better suited for the use of locomotives, and thereafter moved its trains by steam. In 1879 the defendant, under its contract with the two companies, ran over their road in the same way.

It is observable that the right of the two companies, the Long Island and the Atlantic Avenue, to use steam power under the consent of the city and the authority of the State is not assailed. They are not made parties defendant, their right is in no respect challenged; and it would, perhaps, be just to assume it as conceded for the purposes of the present action, and so limit the scope of the inquiry to the question whether the right regained by them could be by them shared with or transferred to the defendant corporation. That, at all events, is the preliminary inquiry. The Long Island Company had, by its charter, the express right to prescribe by what motive power its road should be operated. It could select and use any appliance it pleased. By the contract of 1860 it submitted to a

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restriction upon that power which excluded steam. But the general power remained. The whole range of choice and invention, outside of the one excluded motor, was left. The act of 1876 removed that restriction, and removing it, left the original charter power in full force and without exception. Thereafter it could lawfully choose freely and unquestioned what motive power should be used upon its road. And this it could do, not only as to its own cars, but as to any others which it could lawfully permit to come upon its road. By the act of 1839 it was empowered to contract with any other railroad company; not a company operated by this or that specific motive power, but operated by any, without regard to its special character; and the latter could use the road leased for such use in such manner as "may be prescribed by said contract." By its charter and by the act of 1839 the Long Island Company could dictate to the defendant the use of horses or permit it to use steam. It did the latter, and lawfully conferred the authority. It should be remembered that the use of steam was never by contract or statute forbidden to the defendant. On the contrary, it was organized as a steam railroad. Wherever it could lawfully go, it could go with its own authorized motive power, until it reached a locality where steam was forbidden. It went lawfully upon Atlantic avenue, and steam was not there and then forbidden. On the contrary, it was expressly authorized.

The question, therefore, comes down finally to the validity of the legislative authority which restored the use of steam upon the avenue. And here the absence of the two companies most deeply interested in that question makes itself very strongly felt. It raises an inference that such issue was not intended to be presented for our determination, but in the view we take of the case it seems to us best to waive the difficulty and determine the question as between the present parties and those only.

It is the State which sues. No private citizen is seeking to vindicate his individual rights. That would present a very different case from the one before us. It is the State, repre-

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senting the whole people, which seeks to restrain the defendant from exercising a right which the State, representing the whole people, expressly conferred. That is the decisive answer except as to the constitutionality of the act conferring the authority. The State sues to abate a public nuisance, to stop an unlawful act, to restrain an usurped authority. But that is not a public nuisance which the State has expressly authorized; that is not an unlawful act which the statute has permitted; that is not an usurped authority which is legitimate and granted by law. The State, therefore, must fail, unless—and that is the final inquiry—the act of 1876 restoring the authority is unconstitutional and void.

That act is claimed to violate the provision of the Constitution which prohibits the passage of any private or local bill granting “any exclusive privilege, immunity or franchise whatever.” (Art. 3, § 18.) No “exclusive” privilege was given. The restoration of the right to use steam power was neither exclusive nor a monopoly. The monopoly lay, if anywhere, in the original grant of the right to build the road along its chosen line. The machinery it should use, the power it should adopt, were but incidents of the right. One of these was taken away and then restored. This was not a grant of a new franchise, but a restoration of suspended charter powers, or rather the removal of a restriction from their full and complete exercise. The *Elevated R. R. Cases* (70 N. Y. 361, 327) have substantially decided the question in favor of the constitutionality of such an act.

But it is said this act impaired the obligation of a contract, and the reasoning upon which this objection rests is founded upon a theory that the assessed land-owners were in some way parties to the contract, and had vested rights under it. But they are not here. Their contract rights, if they have any, are not before the court and we are not called upon to determine them. It is our duty to decide a constitutional question only when it is directly and necessarily involved in the issue to be determined. That is not the case here. If there was any contract, to which the assessed land-holders were parties, it was either be-

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tween them and the State, or between them and the two railroad companies. If it was between the land-owners and the State, and amounted to a covenant by the latter not to restore steam on Atlantic avenue, as is contended, it is enough to say that the validity or invalidity of that contract is not here involved. That is a question to be settled between the parties to such contract. A statute is assumed to be valid until some one complains whose rights it invades. (Cooley on Const. Lim., 163.) The land-owners are not here complaining. We do not know that they ever will. They have the power to waive a constitutional provision made for their benefit. (*Embury v. Conner*, 3 N. Y. 511.) Possibly they have already done so, or may in the future. We cannot know, and until they come and present their contract and invoke the constitutional protection, no tribunal is called upon to grant it. The State and the land-holders must be left to settle their own controversies. This one is between the State and the railroad companies. It is only when some person attempts to resist the operation of the act, "and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained." (*Wellington, Petitioner*, 16 Pick. 96.) A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. (Cooley, *supra*, 180.) So that we are to leave the land-owners to vindicate their contract with the State, if they have one, when they please and in their own way. But if, to avoid this answer, the ground is shifted to the theory that the State, represented by its commissioners, was the agent of the land-owners, in making the contract with the railroad companies, and in some manner represents the rights of such land-owners in this action and prosecutes in their behalf, the difficulty is that the necessary facts are wanting. It is still true that the attorney-general, in an action brought by him, represents the whole people and a public interest, and not mere individuals and private rights. (*People v. Booth*, 32 N. Y. 397; *Davis v. The Mayor, etc.*, 14 id. 528.) The question which he can raise is over a public wrong and not

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over a contract between individuals. The rights of the land-owners are personal to each, and not common to the whole people. If the former have a contract with the railroad companies which they have violated, the courts are open to the injured parties, and all their remedies are intact. If in such an action the act of 1876 should be relied upon as a defense, and it became necessary to attack it as unconstitutional because impairing the obligation of a contract, the question would be fairly presented and might have to be met. But it is not before us in this action. The sole question here is, whether the public have been wronged, whether a public nuisance exists, whether a franchise has been usurped or the limits of a charter exceeded. We decline, therefore, to consider the question in this action whether the contracts of individuals not parties before us have been improperly invaded, and must assume as against such objection the constitutionality of the act of 1876. We must hold, therefore, that it gave a valid authority, as against the State, to use steam power upon Atlantic avenue, and that the action was correctly determined in favor of the defendant and the complaint properly dismissed.

The judgment should be affirmed, with costs.

All concur, except DANFORTH, J., not voting, and TRACY, J., taking no part.

Judgment affirmed.

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THE ATTORNEY-GENERAL v. THE NORTH AMERICAN LIFE INSURANCE COMPANY.

The provision of the act of 1869 in reference to the appointment of receivers of insolvent life insurance companies, which authorizes the superintendent of the insurance department to fix the compensation of such receivers (§ 18, chap. 902, Laws of 1869), does not make the decision of that officer conclusive; but upon the presentation of the accounts of a receiver to the court for settlement, the jurisdiction of the superintendent and the regularity of its exercise are before the court, and may be determined by it.

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The said provision confers authority to fix compensation for services rendered, not a rate of compensation for future services.

Parties interested in the fund are also entitled to notice and an opportunity to be heard.

Where, therefore, the superintendent, at the request of a receiver, made before his services had approached completion, and upon an estimate of the assets, less than one-half of the amount upon which the receiver claimed compensation, fixed the rate of allowance at five per cent without notice to any one interested in said assets, *held*, that the order was premature; and that an order made upon settlement of the receiver's account directing a reconsideration by the superintendent of his order was proper.

The proceeds of the securities deposited with the superintendent, as a special fund to secure registered policies, are assets in the hands of the receiver, and he is entitled to commissions thereon.

Premium notes and loans made on policies are not assets upon which the receiver is entitled to commissions; they constitute merely offsets against the liability of the company.

Where a receiver had advanced money to pay taxes upon lands covered by mortgages in the hands of the superintendent, then being foreclosed, which advances were repaid from the proceeds of the foreclosure, *held*, that the receiver was not entitled to commissions upon the sum so refunded.

The special fund in the hands of the superintendent is properly chargeable with its proportionate share of the expenses of the trust.

The receiver has no authority without the direction or consent of the court to invest the moneys in his hands; in the absence of directions it is his duty simply to keep and protect the trust fund, and hold it ready for distribution.

Where, however, a receiver without authority from the court, but acting in entire good faith, placed the fund in the hands of brokers to be loaned on call, and charged himself with the amounts received for interest, it appearing that no part of the fund was lost, and that the parties interested therein were not injured, but were probably benefited, *held*, that an order charging the receiver with interest beyond the amount received was error.

Att'y-Gen'l v. N. A. Life Ins. Co. (26 Hun, 294), modified.

(Argued April 11, 1882; decided May 2, 1882.)

APPEALS by Henry R. Pierson and by certain policy-holders from an order of the General Term of the Supreme Court, in the third judicial department, made at the February term, 1882, which affirmed, save so far as relates to the item of interest, an order of Special Term passing the accounts of said Pierson,

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as receiver of the North American Life Insurance Company. (Reported below, 26 Hun, 294.)

Said Pierson was appointed receiver March 8, 1877, in proceedings under the act chapter 902, Laws of 1869; he presented his accounts up to January 1, 1881, and applied to the court to pass the same. Said accounts stated the total receipts at \$1,368,129.16, upon which sum the receiver claimed commissions at the rate of five per cent. He based this claim upon a letter of the superintendent of the insurance department, dated March 3, 1878, fixing his compensation at that rate. This letter was in answer to a letter of the receiver to the superintendent, in which it was stated that the assets "will not probably realize more than \$600,000."

Of the receipts, \$750,000 was paid to the receiver by the superintendent, being the proceeds of securities deposited with the latter to secure registered policy-holders. The Special Term decided that the receiver was entitled to commissions upon this sum, and that this special fund and the general fund should be charged each with its proportionate share of the expenses of the trust.

Of the receipts as stated in the accounts, the Special Term held that the following items were to be deducted in determining the amount of assets upon which to compute the amount of receiver's fees: The sum of \$398,028.30, which was the amount of premium notes and loans on policies off-set against the face of the policy upon maturity. The sum of \$22,583.09, a sum advanced by the receiver out of funds in his hands for taxes on lands covered by mortgages in the hands of the superintendent, which mortgages were being foreclosed, which sum was subsequently repaid by the superintendent out of the proceeds of the foreclosures.

The receiver charged himself with interest stated to have been received upon loans made by him of the fund in his hands; the account in that respect was confirmed by the Special Term. The General Term held that the receiver should be charged with interest at the rate of four per cent upon his monthly balances, and that his accounts should be sur-

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charged with \$5,754.02, the difference between the interest so computed and the amount he had charged himself for interest. The facts appearing in reference to the loans so made by the receiver are sufficiently stated in the opinion.

Rufus W. Peckham for receiver, appellant. The court assumed a jurisdiction which it did not possess when it substantially set aside the decision of the superintendent of the insurance department, fixing the amount of the receiver's fees. (Laws of 1853, chap. 463, § 17; Laws of 1879, chap. 161, § 2, amending § 17 of the act of 1853; *Atty.-Gen. v. At. Mut. L. Ins. Co.*, 47 N. Y. 336, 340; *Atty.-Gen. v. N. Am. Life*, 80 id. 152, 154; *People v. Assessors*, 39 id. 81; *People v. Police Department*, 72 id. 415; *People v. Mayor, etc.*, 79 id. 582, 589; Bacon's Abridgment, title "Certiorari," subd. "B."; Laws of 1862, chap. 460, p. 849, § 11; *Gardiner v. Tyler*, 3 Keyes, 505; Kerr on Receivers, 216.) Because the court has the "general supervision of the distribution of the funds" is no reason for or justification of the claim to jurisdiction on the part of the Supreme Court, as made in this matter. (Laws of 1869, chap. 902, § 8; *Atty.-Gen. v. Atlantic Life*, 77 N. Y. 336, 340.) When the statute speaks of the "securities" in the hands of the department, the word is not there used as contradistinguished from "assets," but simply to describe those securities or that property of the company which is in the hands of the superintendent as distinguished from the other property or securities of the company in its own possession. (Burrill's Law Dictionary, title "Assets"; Bouvier's Law Dictionary, title "Assets"; *In re Atty.-Gen. v. N. A. Co.*, 8 N. Y. 152.) The statute (Chap. 442 of 1879) as to the fees of the receiver does not touch the case. (*People v. Quigg*, 59 N. Y. 83; *Lefevre v. Society, etc.*, id. 434; *In re Appeal of D. & H. C. Co.*, 69 id. 209; *People, ex rel. v. Brinckerhoff*, 68 id. 259.) The court erred in striking out, as assets of the company upon which the receiver had the right to base his compensation of five per cent, the sum of \$398,028.30 of notes and loans on policies. (*Atty.-Gen. v. Ins. Co.*, 12 Barb. 671.) No

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rule of law was violated by the receiver in the investments of the trust fund made by him. (Story's Equity, § 833 *a*; *King v. Talbot*, 40 N. Y. 76, 89; *Adair v. Brimmer*, 74 id. 539, 550; *Ormiston v. Olcott*, 23 Abb. L. J. 275, reversing 22 Hun, 270; *Livermore v. Worteman*, 25 Hun, 341; *Chesterman v. England*, 81 N. Y. 398, 403, 404.)

Leslie W. Russell, attorney-general, for the people. Premium notes and loans were not assets on which the receiver could claim commissions. (Laws of 1869, chap. 902, § 13; *People v. Security Life Ins. Co.*, 78 N. Y. 127.) The attempt of the superintendent of the insurance department to fix the compensation of the receiver at the time and in the manner he did was premature. (*Gardiner v. Tyler*, 4 Abb. Pr. [N. S.] 463; *Grant v. Bryant*, 101 Mass. 567, 570.) The authority conferred on the superintendent by section 13 of chapter 902, Laws of 1869, was not meant to be exercised to the exclusion of the authority of the court over its officers. (*Malcom v. Rogers*, 5 Cow. 188.) The court might have deprived the receiver of all compensation for improper conduct. (*Moore v. Zabriskie*, 18 N. J. Eq. 51; *Barney v. Saunders*, 16 How. [N. S.] 535, 542.) The receiver is not entitled to any commission except upon the surplus after paying in full the registered policies. (*Matter of Receivership Columbia Ins. Co.*, 3 Abb. Ct. App. Dec. 239-242; *Schenck v. Dart*, 22 N. Y. 420; *Burtis v. Dodge*, 1 Barb. Ch. 77.) It was for the receiver to show, by clear itemized accounts, the exact amount of interest made by the funds in his control, or else all presumptions will be against him, and all obscurities and doubts will be held adversely to him. (Perry on Trusts, § 821; *Boorne v. Maybin*, 3 Wood, 724; 1 Perry on Trusts, § 468; *Utica Ins. Co. v. Lynch*, 11 Paige, 525.)

Raphael J. Moses, Jr., for policy-holders, appellants. When trustees are directed to invest trust-money on government or real securities, and they do neither, the *cestuis que trusts* are only entitled to have the trust-moneys replaced with interest.

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(4 Hare, 500; 1 De G. & S. 314; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Knott v. Cottee*, 16 Beav. 80; Perry on Trusts, § 462, cases under note 5.) If a trustee suffers trust-money to lie idle he is chargeable with simple interest. If he convert the trust-moneys to his own use, or employ them in his business or trade, he is chargeable with compound interest making annual rests. (*Schieffelin v. Stewart et al.*, 1 Johns. Ch. 620; *Dunscomb v. Dunscomb*, id. 527; Perry on Trusts, §§ 468, 669; *Bentley v. Shreve*, 2 Md. Ch. 219; *Rapalye v. Hall*, 1 Sandf. Ch. 339.) The receiver should be charged with legal interest on the sums received until the date of the settlement of the accounts, including his commissions. (Redfield on Surrogates, 708, note 6; *Freeman v. Freeman*, 4 Redf. 211; *Whitney v. Phoenix*, id. 180; *Wheelwright v. Wheelwright*, 2 id. 501; *Harkin v. Teller*, 3 Redf. 316.) The court erred in allowing the receiver commissions on the special fund received by him from the superintendent charged with the trust of its payment to the registered policy-holders; the only interest the receiver could have therein was in the surplus. (*Ruggles v. Chapman*, 64 N. Y. 557; Laws of 1869, chap. 902.)

William Barnes for creditors and policy-holders. The receiver was not entitled to commissions on notes and loans on policies. (Sang's Life Valuations, 45; 11 Assurance Mag. 242; McKean's Life Tables [Am. ed.], 70; Lewis Pocock on Life Assurance, 145; Fackler's Agent's Tables, 19; *Van Buren, Atty.-Gen., v. Chenango Co. Mut. Ins. Co.*, 12 Barb. 671, 672-677; *People v. Security L. Ins. & Ann. Co.*, 78 N. Y. 115; *In re Van Allen*, 37 Barb. 228; 2 R. S. [1st ed.] 47, part 2, chap. 5, title 1, art. 8; Laws of 1853, chap. 463, § 11; *People v. Security Life Ins. Co.*, 78 N. Y. 115, 127.) The receiver was only entitled to such commissions as are allowed executors. (*Gardiner v. Tyler*, 42 N. Y. 508, 509; 4 Abb. Pr. [N. S.] 463; 3 Trans. App. 161; *Muller v. Ponder*, 6 Lans. 473; *Grant v. Bryant*, 101 Mass. 567; *French v. Gifford*, 31 Iowa, 430; *Howes v. Davis*, 4 Abb. Pr. 71; Edwards on Receivers [2d ed.], 645-651.) The allowance by the super-

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intendent of insurance of the receiver's fees and compensation was *coram non judice*, inoperative, null, void and of no effect in the premises. (*People v. Security Life*, 79 N. Y. 267; *Matter of Canal v. Walker St.*, 12 id. 406; *Matter of N. Y. C. & H. R. R. Co.*, 65 id. 60; *Matter of R. R. Co.*, 64 id. 60, 62; *Matter of Appointment of Mayor*, 49 id. 150; *Gardiner v. Tyler*, 4 Abb. Pr. [N. S.] 463; *Green v. Bryant*, 101 Mass. 567, 570; *Muller v. Ponder*, 6 Lans. 474, 482; Edwards on Receivers, 643-660.) The amount debited by the receiver to himself personally, and credited to himself as receiver, on account of fees and commissions, without any order of the court in the premises, should be repaid to the fund with compound interest. (2 Wait's Pr. 243; High on Receivers, 515; Redfield on Surrogates, 708; *Freeman v. Freeman*, 4 Redf. 211; *Whitney v. Phoenix*, id. 180; *Wheelwright v. Wheelwright*, 2 id. 201; *Harkin v. Teller*, 3 id. 216.) The *cestuis que trust* may elect between charging the receiver with interest or the actual profits realized by him; if the actual profits cannot be ascertained, the court will charge compound interest. (2 Wait's Pr. 250-260; High on Receivers, §§ 797, 803, p. 177, § 274; *Bourne v. Maybin*, 3 Wood, 724; *Corey v. Long*, 43 How. Pr. 492; *Utica F. Ins. Co. v. Lynch*, 11 Paige's Ch. 520, 523.)

William D. Whiting for various registered policy-holders. The notes and loans on policies were properly deducted from the amount on which commissions should be allowed. (*In re Security Life Case*, 78 N. Y. 127.) The discretion given to the superintendent of insurance to fix the compensation of receivers is similar to the discretion given to judges of the Supreme Court in fixing receivers' commissions, and may be reviewed at Special Term. (*Gardiner v. Tyler*, 4 Abb. [N. S.] 468; *Green v. Bryant*, 101 Mass. 567, 570; *Muller v. Ponder*, 6 Lans. 474, 482; Edwards on Receivers, 643-660.) The deposit with the superintendent of insurance is not subject to receiver's commissions and expenses in case of insolvency. (*Ruggles v. Chapman*, 59 N. Y. 163; *In re Guardian Life*, 13 Hun, 115.) The receiver, was not entitled to draw any

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commissions until the settlement of his account. (Redfield on Surrogates, 708; 2 Wait's Pr. 243; High on Receivers, 515.) A receiver should keep separate accounts so that the fund may be traced. (High on Receivers, §§ 797, 803; 2 Wait's Pr. 250; *Utica Ins. Co. v. Lynch*, 11 Paige's Ch. 520; *Bourne v. Maybin*, 3 Wood, 724; *Corey v. Long*, 43 How. Pr. 492; Perry on Trusts, 569, § 468.)

Lucius McAdam for policy-holders. The order appealed from is right in deducting from the receipts stated by the receiver the amount of notes and loans on policies outstanding, the same not being assets within the meaning of section 13, chapter 902 of the act of 1869. (*People v. Security Life*, 78 N. Y. 127; *Matter of Globe Ins. Co.*, 2 Edw. Ch. 625; *Osgood v. De Groot*, 36 N. Y. 348; High on Receivers, 511; *Van Buren v. Chenango Co. Mut. Ins. Co.*, 12 Barb. 671.) The order is right also in deducting the amounts of premium and interest deducted from death-claims. (*People v. Security Life*, 78 N. Y. 126; *Atty.-Gen. v. Guardian Life*, 82 id. 338.) The facts, records, and circumstances of the receivership must be before the judge or officer before he can assume the power of fixing the fees. (*Gardiner v. Tyler*, 4 Abb. [N. S.] 468; 3 Trans. App. 161.) Chapter 442, Laws of 1879, has no application to this case. It did not purport to amend the act of 1869, and, in fact, refers only to banking associations and bankers. (4 Edm. 144, under title "Police Banking;" Banks' Bros. 6th ed. R. S., vol. 2, p. 323, under title "Safety Fund Banks.") The order of the learned judge, at Special Term, providing that the expenses should be borne *pro rata* by the different funds, conforms to the act of 1869, to the law and practice of the court, and to the principles of equity and natural justice. (*Atty.-Gen. v. North Am. Life*, 80 N. Y. 152; 82 id. 172; R. S. 2 Edm. 47, § 29; 2 Daniels' Ch. Pr. 1411 *et seq.*)

FINCH, J. Sufficient reasons have been assigned for directing a reconsideration by the insurance department of its order

fixing the compensation of the receiver in this action at five per cent, upon the amount of assets of the company which should come into his possession. That order was premature. It was made before the services of the receiver had even approached completion; before commissions were earned or payable; when it was not certain that the officer would complete his duties; when the amount of care and labor required could only be estimated and could not be known; and when any just ground of judgment was hidden in the uncertainties of the future. It was *ex parte*. Nobody interested in the disposition of the assets had notice or an opportunity to be heard. The receiver wrote a letter requesting an allowance of five per cent, and the superintendent wrote an answer granting it, and although its consequence was to take from the fund, according to the receiver's claim, about \$68,000, nobody was allowed opportunity to object, or to influence the important and serious decision. It seems to have been made under a misapprehension. The receiver represented in his letter that the amount of assets likely to come into his possession would be about \$600,000. He now claims commissions upon more than double that amount. It is probable that his estimate was made in good faith, possibly because at the time he did not consider the fund in the possession of the insurance department subject to commissions, but nevertheless we cannot be certain that the mistake was immaterial, and had no effect upon the judgment of the superintendent. A decision thus made and producing a result so serious ought not to stand.

But it is said that it must stand; that there is no remedy; that the action of the superintendent is conclusive; and the interference of the courts is arbitrary and without authority. The argument is that under the statute (Laws of 1869, chap. 902, § 13), the compensation of the receiver is to be fixed by the superintendent, and as no notice is expressly required to be given, and no time or occasion specified for the performance of the duty, the officer charged with it is the sole and only judge of the proper time, the suitable occasion, and the rate or amount to be awarded. We do not assent to that doctrine. The re-

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ceiver is the officer of the court. It made him and can unmake him. He has no independent authority or power. He is the mere agent or instrument through whom the law takes into its own custody the assets and property of the insolvent corporation, closes its business and makes final distribution. The receiver is under the control of the court. He can do nothing without its orders. When at the end of his duty he presents his accounts, his proper compensation is to be determined by the courts, unless some statute has fixed it or bestowed the authority elsewhere. In the present case he comes before the court to settle, and surrender his trust. Upon the question of compensation he sets up the decision of the superintendent. He brings it into court and claims under it, and so it comes before the court. He subjects it to the scrutiny which that tribunal has a right to exercise and cannot justly withhold. He brings it there as controlling and conclusive, and claims the benefit of it, and that question is fairly presented and must be determined before the distribution can be made which it is the duty of the court to make. And so the jurisdiction of the superintendent and the regularity of its exercise are both before the court, and both involved in its legitimate inquiry.

The statute thus invoked does one of two things, and must be construed in one of two ways. It either authorized the superintendent to fix the rate of compensation in advance, or to determine the proper compensation when the service had been performed. We think the latter is its only true and just construction. A statute may fix a rate of compensation in advance, applicable to a given class of cases, and without reference to a particular individual or specific circumstances. But where an officer is authorized to fix the compensation for services of another officer to be thereafter rendered, and such services necessarily run over a long time and may be widely different in different cases, and deserving consequently a different treatment, we think the authority confers power to fix compensation for services rendered, and not a rate of compensation for services to be rendered in the future. The act of the superintendent is in its nature judicial. He is to act upon

existing facts, and estimate the value of services which have been rendered, and, therefore, can be known and measured. When it appeared that the judgment invoked by the receiver was not such as the statute contemplated, and in addition that it was obtained without the knowledge of parties interested, and upon a mistaken statement of assets naturally tending to affect the mind of the superintendent, the court had a right to deny to its officer the benefit of the decision he claimed, and say to him that if he desired the benefit of the statute and preferred the estimate of the superintendent to the valuation of the court he must go back and get it; obtain it upon the basis of services substantially completed and therefore capable of being accurately known; obtain it fairly upon facts correctly stated and not tending to mislead; obtain it openly and with opportunity for parties interested to be heard. The power of the court would be very weak if it could not control its officer so far as this. It does not by such direction disregard the statute, or the right of the receiver under it. It recognizes both. It simply requires of its own officer, for whose conduct it is largely responsible, that he shall avail himself of such a right fairly and justly before he asks the court to ratify, and recognize, and act upon it.

In the computation of commissions the special fund deposited with the superintendent as security for registered policies and annuity bonds was treated as assets in the hands of the receiver. The propriety of that decision is questioned on behalf of the policy-holders, mainly because of the provision (Laws of 1869, chap. 902, § 7) that the receiver is to take possession of all the assets and credits of the company, "except the securities deposited in the insurance department." But the next section provides (§ 8) that these securities are to be sold and converted into money by the receiver, superintendent and State treasurer, and when so converted the proceeds are to be paid over to the receiver on his giving his receipt to the superintendent, and the former is thereupon to pay them out; satisfying first the registered policies outstanding, and applying any surplus together with other assets of the company to the payment of its

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just debts. We decided, under this provision, that the receiver became the rightful custodian of the proceeds realized, that they were held by him in his official capacity and their safety secured by his bond, and that the superintendent could not delay their transfer until the receiver was ready to make distribution. (*Att'y-Gen'l v. North America Life Ins. Co.*, 80 N. Y. 155.) These proceeds were thus assets in the possession of the receiver, and by him received and disbursed, and were properly considered such for the purpose of calculating commissions.

Certain other items in the receiver's account, claimed by him to be assets, were denied to be such for the purposes of the computation. The premium notes and loans on policies, amounting to nearly \$400,000, were thus rejected upon the ground that they constituted merely offsets against the liability of the company, and were, as it was tersely expressed by the learned judge at Special Term, "figures, not assets." It is now contended that this ruling was erroneous, that the notes in the hands of the receiver were property, and the company could have sued upon them and recovered. We may grant that they were property without necessarily being conducted to the conclusion that they were assets in the possession of the receiver, for the purpose of estimating his commissions. The policy-holder who had given such a note to the company was a creditor only for the balance, and the dividend payable to him was to be made upon such balance. (*People v. Security Co.*, 78 N. Y. 127; 34 Am. Rep. 522.) As matter of fact it follows that the proceeds of such notes were neither actually received by the officer nor disbursed by him. What happened was a computation and payment of a balance, and the process was one of account rather than the receipt and payment of money. To allow commissions upon this class of items would be to give them upon receipts and disbursements having only a constructive and not an actual existence.

It was proper also to deduct from the total of assets the \$22,000, representing taxes paid upon lands sold on foreclosure of mortgages held by the superintendent. Otherwise the re-

ceiver would get a double commission upon the sum. Practically it amounted only to a loan by him from general assets to the special fund which the latter returned to him.

That part of the order which apportioned the expenses of the trust *pro rata* between the general and the special fund is resisted on behalf of the registered policy-holders, who claim that the whole of the fund provided for their security should be preserved for them without diminution or abatement. Section 13 of the act of 1869, after providing for the manner in which the compensation of the receiver shall be fixed, authorizes him to employ necessary clerks and actuaries who shall be paid such reasonable compensation as he shall determine, subject to the approval of the superintendent; and then adds "all of which compensation to said receiver, clerks and actuaries shall be a charge on the funds of such company and paid out of said funds." No distinction is here drawn between the general and special funds of the company, but the expenses are imposed upon its funds without exception or discrimination. The argument to release the registered fund, because by section 8 it is to be paid over to the registered policy-holders, does not impress us. It is justly suggested that upon such construction, in a case where all the policies were registered and the fund was just sufficient to meet them, there would be no provision for the payment of expenses. It is said in such case there would be no insolvency and nothing for the receiver to receive. But the provisions of section 8 indicate that, although not technically insolvent in such case, its business would be closed and its assets distributed, because it is only where the actuary's report shows that there are funds sufficient not only to pay the policies and obligations, but also "the legal costs and expenses of the receivership," that the business of the company can be continued. Of course it is difficult, if not impossible, to reach absolute justice in the proper apportionment of expenses to the two funds, but the mode adopted of a *pro rata* distribution seems to us just and the best attainable.

The remaining questions raised relate to the conduct of the receiver in the care and investment of the funds committed to

his charge, and which has been criticized with the effect of inducing the General Term to impose upon him a charge for interest beyond that which he admits to have been received. The case shows that he invested the funds in his hands without the direction or consent of the court. He should have sought its authority and acted in obedience to its orders. He loaned the money through the agency of a firm of brokers, trusting them with its possession and control without security of any kind, and relying solely upon their responsibility and business honor and integrity. While he had a right so to use his own money, it was wrong to subject trust funds to such possibilities of danger and the risk of loss involved. He directed these moneys to be loaned on call, and upon the security of sound collaterals, but kept no detailed account of such loans; produced none kept by his agents; cannot name a single borrower; cannot specify a single loan; furnished no facts by the aid of which the investments could be traced and their character ascertained, or his agent's statement of the amount of interest earned be verified. The court has nothing to depend upon but his own assertion of the amount of interest received, and that is stated in his account, as nearly as we can ascertain, in seven items admitting its receipt generally and in gross, and aggregating nearly \$30,000, and leaving unexplained the sources from which it came, or the particular sums which produced it. These things were wrong and a violation of duty.

The statute only authorizes the receiver to collect and pay. It gives no command to invest. Where no directions are given by the court it is his duty simply to keep and protect the trust fund and hold it ready for distribution. If parties interested desire it to be invested, they may apply to the court for such an order, and although they neglect to do so, a loan by the receiver, even temporarily, is a breach of trust. (*Utica Ins. Co. v. Lynch*, 11 Paige, 522.) He takes the fund strictly subject to the orders of the court and to be disposed of by its direction. (High on Receivers, §§ 177, 178.) He is held to great strictness in rendering his accounts and must keep them so that the fund can be traced (*id.*, § 803), and they must be

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clear, accurate and distinct. (*Bourne v. Maybin*, 3 Wood, 724.) The court, therefore, would have been justified in charging against the receiver the interest complained of, if there was just occasion for so doing. With serious doubt and hesitation on the part of some of us, we have in the end concurred in the opinion that such just occasion does not here exist. The receiver appears to have acted in entire good faith and without trace of any wrong intention. We have no reason to suspect him of any personal benefit in the transaction. No part of the fund has been lost. It is all safe and ready for distribution. No injury has resulted to the parties interested, but on the contrary, it is quite probable that a larger interest has been obtained than would have resulted from the direction of the court. Although disapproving what has been done, we do not think the case is one for punishment, because entire good faith and honesty of intention is manifest, and the fund has been benefited and not harmed.

We, therefore, reverse so much of the order of the General Term as charges the receiver with interest beyond that received by him, and affirm it in all other respects, but without costs.

All concur.

Ordered accordingly.

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WILLIAM BARNES, Appellant, v. EDWARD NEWCOMB, as Receiver, etc., Respondent.

An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attorney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability.

The A. M. Life Insurance Co., having been served with an order to show cause why a receiver should not be appointed, retained plaintiff to oppose, which he did. The application was granted. Plaintiff advised, and at the request of the officers took an appeal to the General Term and to the Court of Appeals; the order was affirmed. Afterward, without any specific instructions, but with the knowledge and assent of the officers,

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plaintiff opposed the confirmation of the report of the actuary. In an action to recover for his services plaintiff testified that he rendered such services under the original general retainer. *Held*, that there was no entire contract, at the time of the original retainer, established, binding the company and its assets for its performance, so as to create a liability on the part of the receiver, payable out of the funds, for services rendered after his appointment; and that plaintiff was only entitled to recover for services rendered before such appointment.

It seems that where the officers of a company believe it to be solvent, and have reasonable grounds for such belief, it is their duty to oppose such an application, and that the reasonable expenses incurred should be allowed to them.

It is competent for the court administering the fund, if there is just ground and probable cause for appealing from the order appointing a receiver, to allow a reasonable sum for the expenses.

This, however, is not an absolute right, enforceable by action, but is entirely in the discretion of such court and to be exercised in that proceeding.

(Argued April 13, 1882; decided May 2, 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the January term, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought against defendant, as receiver of the Atlantic Mutual Life Insurance Company, to recover for services rendered by plaintiff's firm as attorneys and counselors for said company in opposing the application for the appointment of receiver, and upon appeals to the General Term from the order making the appointment to the Court of Appeals from the order of affirmance, and for various other services after the appointment of the receiver.

The Special Term gave judgment for the services prior to such appointment, but decided against the plaintiff as to the subsequent services.

William Barnes for appellant. The order of August 6, 1877, appointing a receiver and restraining the company from its further continuance in the business of life insurance, did

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not operate as an injunction against an appeal, and a further defense by the company in the said proceedings, and did not annul or affect the retainer of its attorneys and counsel in the said litigation, or their right of recovery and compensation for professional services rendered or to be rendered, or for disbursements incurred or to be incurred therein. (Laws of 1869, chap. 902, § 7; *Att'y-Gen'l v. Bank of Columbia*, 1 Paige, 518.) The managers and officers of the company not only had the right but it was their duty to do what they could to keep it in life. (*Sheldon Hat Co. v. Eckmeyer Hat Co.*, 66 How. Pr. 70; *Copeland v. Citizens' Gas Co.*, 61 Barb. 605; *Abbott v. Am. Hard Rubber Co.*, 33 id. 538; *Ryckman v. Parkins*, 5 Paige, 543; Thompson on Prov. Remedies, 485, 486; Hoffman on Prov. Remedies, 508.) In resisting the legal proceedings taken by the attorney-general and receiver to restrain the company from transacting business, and to distribute its assets and to practically end its corporate existence, the officers acted as the legal trustees of the stockholders and creditors of the company and in the performance of their trust duties, and are entitled to the payment of what are called "trustees' costs," as between solicitor and client. (Beames on Costs [Lond. ed. of 1840], p. 146; 2 Daniell's Ch. Pr. 1438, 1411; Law of Trusts by Tiffany & Bullard, 713; Lewin on Law of Trusts [7th ed.], 846; Burrill on Assign. [3d ed.], § 417, pp. 575, 576; *Noyes v. Blakeman*, 5 N. Y. Sup. 539, 543, 544; Lewin's Law of Trusts [6th ed.], 528; 1 Perry on Trusts, §§ 907, 910, pp. 537-540; Hill. on Trustees [Am. Notes], 883, margin 570, 573; Goldsmith's Eq. [6th ed.] 596, 597, 602; *Fay v. Erie & Kalamazoo Bank*, Har. Ch. [Mich.] 194; Thompson on Prov. Remedies, 481; Burrill on Assign. [3d ed.] 538, § 391; *Receiver v. Paterson Gas-light Co.*, 3 Zab. 283; 23 N. J. L. 000; *Hyde v. Lynch*, 4 Comst. 357, 392; *Att'y-Gen'l v. The L. & F. Ins. Co.*, 4 Paige, 224.) In an action or special proceeding for the administration and distribution of a fund in the hands of the court, where a judicial apportionment or determination of rights is necessary for this purpose, the costs, counsel fees and ex-

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pense of all necessary parties are a lien and charge upon the fund, as necessary expenses or allowances, prior to distribution. 1 Bacon's Abr [Phil. ed. of 1842] 504; Willard's Eq. Jur. [Potter's ed.] 49; *House v. Finch*, 1 Ves. Ch. 36; *Cooper v. Pitcher*, 4 Hare, 485; *Perry v. Whitehead*, 6 Ves. 545; 10 Eng. Rep. [Equity Case] 794; *Orton v. Smith*, 5 Eng. Rep. 518; *Lee v. Delane*, 4 DeG. & S. 1, 6; *Thomason v. Moses*, 5 Beav. 77; *Boreham v. Bignall*, 8 Hare, 131, 134; *Knott v. Cotter*, 13 Eng. L. & Eq. [Dig. Smith] 196; *Howe v. Wilson*, 2 R. & M. 687, 688; *Wedgewood v. Adams*, 8 Beav. 105; *Merlin v. Blagrove*, 25 id. 125; *Larkins v. Paton*, 2 M. & K. 320; *In re Richardson*, L. R., 14 Ch. Div. 611; *Thomas v. Jones*, 1 D. & S. 134; *In re State Fire Ins. Co.*, De G. J. & S. Ch. 634; Albert Arbi. Dec., Parts 1-3, in 1871-3. [Reported by Francis S. Riley, Stevens & Haynes, London, 1872], p. 10; The Albert Life Assurance Company Arbitration Act, 1871, 34 and 35 Vict., chap. 31, passed May 25, 1871; *Werninck's Case*, p. 103; *Morrell v. Dickens*, 1 Johns. Ch. 153; *Grover v. Wakeman*, 11 Wend. 226; *Irving v. De-Kay*, 9 Paige, 533; *King v. Strong*, id. 94; *Atkinson v. Marks*, 1 Cow. 693; *Badeau v. Rogers*, 2 Paige, 209; *Richards v. Saltin*, 6 Johns. Ch. 445; *Canfield v. Sterling*, 1 Hopk. 224; *Campbell v. Dunstan*, 4 Johns. Ch. 333; *Mason v. Codwise*, 6 id. 297, 301; *Wilson v. Wilson*, 32 Barb. 346; *Livingston v. Murray*, 68 N. Y. 493; *Bergen v. Carman*, 79 id. 153; *McLean v. Freeman*, 70 id. 89, 90; *Ins. Co. v. Mechs. Mut. F. Ins. Co.*, 122 Mass. 422; *McCoy v. Appleby Manuf. Co.*, 1 Bradw. 78; *Von Schmidt v. Huntington*, 1 Cal. 56, 74, 75; *Guy v. Globe L. Ins. Co.*, 9 Ins. L. J. 474, 476, 224; 2 Daniell's Ch. Pr. 1402, 1405, 1406; Lewin on Law of Trusts, 321; 1 Bouvier's Law Dict. 752.) The Atlantic Mutual Life Insurance Company, having been sued by the permission of the court, and having interposed an answer, and the issues thereon having been tried and determined against the said company on the first trial, and judgment having been rendered for the plaintiff for the sum of \$12,104.59, and the said company not having appealed therefrom, and the said judgment still re-

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remaining on record against the company, in full force and unreversed, it constitutes a valid claim against the assets of the said company in the hands of the receiver. (*People v. Rensselaer Ins. Co.*, 38 Barb. 325; *Kincaid v. Dwinelle*, 59 N. Y. 548, 553; *Willitts v. Waite*, 25 id. 583.) The judgment rendered for the plaintiff on the second trial, and any further sum, for which this court may decide that the plaintiff is entitled to a recovery, should be adjudged and decreed to be a prior lien and claim upon the fund in court in the hands of the receiver. (*Hare v. Rose*, 2 Ves. Sr. 558; *Ford v. Earl of Chesterfield*, 21 Beav. 427, 428; *Major v. Major*, 2 Drewry, 282, 283; 5 Eng. Rep. 685; 2 Daniell's Ch. Pr. [4th Am. ed.] 1423; *In re Mayhew*, *Rowles v. Mayhew*, Ct. of App. Ch. Div. [Apl. 1877], 4 L. & Eq. 641; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 539; Pemberton's Judgments and Orders of the Court of Appeal and High Court of Justice, pp. 222, 223 [London ed., 1876]; *Sutton v. Doggett*, 3 Beav.; Sayer's Law of Costs [London ed. 1777], 1-2; Banks' Code of 1879, § 66; Beames on Costs, 207; *Turwin v. Gibson*, 3 Atk. 719; 2 Hullock, 526; 2 Wait's Pr. 203; Willard's Eq. Jur. [Potter's ed.] 334; *In re Butler's Estate*, 13 Ir. Ch. [N. S.] 456; High on Receivers, § 134, p. 89; *Magee v. Gillelan*, 1 Paige, 644.) The plaintiff is entitled to recover for the work, labor and services performed by him and his firm and for the expenses incurred, whether such services were performed and disbursements expended before or after the appointment of the receiver. (*Bathgate, Admr., v. Harkin*, 59 N. Y. 533; *Gustin v. Stoddard*, 30 N. Y. Sup. Ct. 100; 11 N. Y. Weekly Dig. 216; *Tracey v. Stearns*, 12 id. 533; *Davis v. Stover*, 16 Abb. Pr. [N. S.] 225; *People v. Nat. Trust Co.*, 10 N. Y. Weekly Dig. 571; *People v. Nat. Trust Co.*, 82 N. Y. 283; *Roberts v. Austin*, 26 Iowa, 316; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *Matter of Colvin*, 3 Md. Ch. Dec. 280, 303; Kerr on Receivers [Bispham's 2d ed.], 221; Edwards on Receivers, 3, 12.)

Nathaniel C. Moak for respondent. Upon the appointment of the receiver, the title to the assets vested in him for the

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creditors of the company. Neither the company nor any one acting under it could thereafter charge or incumber the assets with any liability or entitle one acting under or by authority of the company to any judgment against the receiver. (*Matter of Berry, Receiver*, 26 Barb. 55, 59, 62; *People v. Security, etc.*, 23 Hun, 596; *People v. Security Life Ins. Co.*, 71 N. Y. 226, 227; *Noel v. Walsingham*, 2 Sim. & Stu. 970; *Morgan v. N. Y. & A. R. R. Co.*, 10 Paige, 290, 295; *Granstine's Appeal*, 49 Penn. St. 321; *Travers v. Waters*, 12 Johns. 500; *Krietz v. Frost*, 55 Barb. 474; *Savage v. Darrow*, 4 How. Pr. 74; *Eldridge v. Streutz*, 39 N. Y. Sup. Ct. 295; *Batchelder v. Tenney*, 27 Vt. 784; *Conable v. Bucklin*, 2 Atk. 221.) The statute under which the receiver was appointed (§ 8, chap. 902, Laws of 1869) expressly directs what disposition shall be made of the funds and assets of the company that go into the receiver's hands and thus places it beyond the power of the court to give the money to the attorney of the company, which has been condemned for mismanagement in preference to the policy-holders who created the fund and to whom the money rightfully belongs. (*In re Atty.-Gen. v. N. A. L. Ins. Co.*, 18 Hun, 471; *In re Lamberson*, 63 Barb. 297; *Struthers v. Christal*, 3 Daly, 328; *Relfe, Supt., etc. v. Life Assn. of A.*, 9 Mo. App. 586; *Tuthill v. Lupton*, 1 Edw. Ch. 564; *McLean v. Freeman*, 70 N. Y. 81; *Noyes v. Blakeman*, 6 id. 567, 581; *Ryckman v. Perkins*, 5 Paige, 543; *Leonard v. Freeman*, Col. & C. Cas. 491; *People, ex rel. v. Security Life Ins. Co.*, 71 N. Y. 224.)

RAPALLO, J. We are of opinion that for the services rendered by the plaintiff to the corporation after the appointment of the receiver, an action against the receiver cannot be maintained. The company, or its officers, could not after that date subject the fund in the hands of the receiver to any legal liability. For its indebtedness to the plaintiff, incurred before the appointment of the receiver, the plaintiff has been permitted to recover. For that incurred afterward he was not permitted to recover.

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The plaintiff seeks to avoid this difficulty, and to make his claim for services rendered after the appointment relate back to a period anterior to such appointment, on the ground that they were rendered under a contract made prior thereto, viz.: at the time of his original retainer in May, 1877, and that such retainer was an entire agreement which covered all services he might render throughout the litigation. What effect, if any, a special contract of that description, covering future legal services (if proved), would have upon the question now at issue, it is needless to discuss, for no such contract was proved. The only evidence in the case as to the employment is the testimony of the plaintiff himself. He states that an order was made on the 11th of May, requiring the company to show cause on the 14th why a receiver should not be appointed, and that on the 12th of May he was retained by the officers of the company to oppose its being placed in the hands of a receiver, and under that retainer he opposed the motion, took testimony, etc., and that the order appointing the receiver was made on the 6th of August, 1877, and his services were paid for up to the closing of the testimony and no farther. That he and his associate counsel then advised an appeal, and he was requested by the officers of the company to take the appeal, which was taken to the General Term, where the order was affirmed. That the same officers desired him to take a further appeal from the order of the General Term to the Court of Appeals, and in accordance with this request on behalf of the company he did so. Afterward, without any specific instructions, but in accordance with his knowledge and general retainer, and with the knowledge and assent of the officers, he opposed the confirmation of the report of the actuary, and that he rendered the subsequent services for which, in this action, he claims to recover compensation, under the same general retainer.

We think this evidence fails to make out an entire contract, for the performance of which the company or its assets became bound at the time of the original retainer, so as to create a liability on the part of the receiver for services rendered after the

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date of his appointment, and that the finding of the court in that respect is unsupported by any evidence.

The trial court, however, found that the opposition on the part of the company to the appointment of a receiver was in good faith and with a conviction of the solvency of the company, and its right to conduct its own business, and that it had probable cause and reasonable ground for such opposition. Under such circumstances it was clearly the duty of the officers of the company, as trustees for all parties interested therein, to take the necessary steps to protect its corporate existence, and to repel the attack which they regarded as unfounded, and it is but just that such reasonable expenses as they incurred for those purposes should in some form be allowed to them. But it was entirely in the discretion of the court, in administering the fund, to determine up to what stage in the proceeding the opposition was proper, and what should be a reasonable sum to be allowed for the services rendered, or whether any allowance should be made. If there was just ground and probable cause for appealing from the order appointing a receiver, it was competent for the court, in its discretion, to allow a reasonable sum for the expenses of such appeal. It appears that the propriety of that appeal was recognized by this court, by allowing to the company costs of the appeal to be paid out of the fund, which was all that it had power to allow, any further allowance being within the province of the court holding the fund. Whether the proceedings subsequent to the affirmance of the order were justifiable and proper, and any allowance should be made in respect to them, rests in the sound discretion of the court which controls the fund.

As a general principle, trustees of a corporation whose corporate existence is attacked, should be afforded the means of resisting such attack, so far as the facts justify and their duty demands. Public policy requires that they should be protected to this extent, but no farther, and a premium should not be held out for captious and vexatious contests at the expense of the fund, which the court is under the highest obligation to preserve, as far as possible, to meet the just debts and liabilities of the

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corporation. But the claim of the trustees to be protected in the defense of the corporation they represent, or that of their counsel to be paid out of the fund for opposing the appointment of a receiver, however just it may be, is not an absolute right which can be enforced by an action in their behalf against the receiver, but is a matter to be addressed to the sound discretion of the court in which the proceeding is pending, and such discretion should be exercised in that proceeding, and as part thereof, and upon a consideration of all the circumstances.

In the present case the plaintiff made an application to the Supreme Court, on which application it would have been competent for the court to pass upon the merits of his claims, and afford him such relief as he was entitled to; and in fact the court entertained the application, and made an order referring it to a referee to take proof of the plaintiff's claims and report the facts to the court. But as part of the same order they gave to the plaintiff the alternative privilege of bringing an action. He elected that course instead of going before a referee, and, on the proofs taken before him, appealing to the discretionary powers of the court. By so doing he assumed the burden of establishing that he was entitled to payment as matter of right, enforceable by action, and not resting in discretion. This right of action he has in our judgment failed to make out.

We think, however, that justice requires that his claim be examined, and the discretion of the court exercised thereon. The court will have full power to determine for what services (if any) he should be allowed, and what, in its judgment, would be a reasonable and fair compensation therefor.

The judgment should be affirmed, without costs, and without prejudice to a renewal of the plaintiff's application to the court for payment of his costs and reasonable counsel fees and expenses out of the fund in the hands of the receiver.

All concur.

Judgment accordingly.

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TOBY W. JOHNSTON, Appellant, v. JOHN STIMMEL et al., Respondents.

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The United States, by voluntarily appearing in a State court as a claimant to a fund therein, subjects itself to the jurisdiction of the court, and will be bound by its decision.

After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged unless the United States consented to appear and submit to the jurisdiction of the State court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant discharging the original defendant from liability and directing plaintiff to satisfy the mortgage, upon payment into court of the amount due, with costs; with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action, on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff. *Held*, that the order was proper.

Plaintiff claimed that as his action was against defendants upon whom the attachment had not been served, he was entitled to proceed against them. *Held* untenable; as the liability of the defendants was for the same debt, which was paid by the payment into court, leaving simply the question as to who was entitled to the fund to be determined, in which none of the former defendants were interested.

(Submitted April 11, 1882; decided May 2, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 3, 1882, which affirmed an order of Special Term, the substance of which is hereinafter stated. (Reported below, 26 Hun, 435.)

This action was brought to foreclose a mortgage upon a certain leasehold estate in the city of New York, executed by defendant Conrades to secure his bond given to Harrison Johnston, father of the plaintiff.

Conrades conveyed the estate to defendant Warnsdorfer January 1, 1875, subject to said mortgage, which the latter

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assumed. Plaintiff claimed by assignment from his father, dated October 29, 1879, and recorded November 5, 1879. On April 30, 1879, the United States commenced an action against said Harrison Johnston in the United States Circuit Court for the southern district of New York. On March 5, 1880, after the recording of said assignment, an attachment in said action was issued to the marshal of the southern district of New York, who attached in due form the mortgage debt, and notice thereof was duly given to Warnsdorfer and Harrison Johnston. The assignment of said mortgage to the plaintiff was claimed by the United States to be fraudulent and void. Both plaintiff and his assignor are non-residents of this State. On April 29, 1880, and after service of the attachment on him, Warnsdorfer conveyed the property to the defendant Stimmel, who was not willing to assume the payment of the mortgage debt, and desired that it be discharged, but, by reason of the levy under the attachment, the same could not be paid off, and on that day the amount of said mortgage debt was deposited in the United States Trust Company to the joint credit of Warnsdorfer and Stimmel, to be drawn therefrom only upon their joint order and for the purpose of paying off said mortgage; and the money continued in said trust company until it was paid to the clerk of this court, by virtue of the order appealed from November 3, 1881. In July, 1881, this action was commenced. In September, 1881, a motion was made on behalf of Warnsdorfer in the action in the United States court, to discharge the attachment and levy as to said mortgage debt, and for permission to pay the same to the plaintiff in this action. Upon said motion an order was made directing the discharge of said levy, etc., unless the United States consented to appear and yield to the jurisdiction of the State court, and allow the questions as to the right of the United States to hold its lien to be determined on the merits, if, on a motion to be made by the defendants, said court should direct the United States to be interpleaded or to be substituted as a defendant. The plaintiff herein had due notice of that motion in the United States court, but

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did not appear thereon. Thereafter, a motion on affidavits showing these facts was made on behalf of the defendants, Stimmel and Warnsdorfer, for leave to pay the amount of said mortgage into court, and that the United States of America be substituted as the defendant therein, or that it be brought in as a defendant in their stead. The motion was granted and the plaintiff was directed to discharge the mortgage upon payment of the amount due on the mortgage, with costs. Directions were given as to the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action. In default of such submission and consent, or in case of such submission and of final judgment for plaintiff, the clerk of the court was directed to pay over the moneys deposited to the plaintiff.

Hamilton Wallis for appellant. The claim of the United States is a mere nominal one, and would not support an interpleader. (*Thurber v. Blanck*, 50 N. Y. 80; *U. S. Trust Co. v. Wiley*, 41 Barb. 477; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *Castle v. Lewis*, 78 N. Y. 131.) A sovereignty cannot be impleaded in court without its consent. (U. S. Rev. Stat., § 771; *U. S. v. Ames*, 1 W. & M. 76; *U. S. v. Boyd*, 5 How. 29; *Dikeman v. Dikeman*, 11 Paige, 484; *Green v. Biddle*, 8 Wheat. 84.) An interpleader cannot be ordered between a creditor and an attaching creditor. (*U. S. Trust Co. v. Wiley*, 41 Barb. 477, 479; *Sherman v. Partridge*, 4 Duer, 649.) The order appealed from should be reversed, because it can accomplish nothing. (*U. S. v. Ames*, 1 W. & M. 76.)

De Witt C. Brown for respondents. There is no absolute right to costs to either party in a common-law action till judgment, and at any time before judgment the court has entire control over costs. (Code of Civil Procedure, §§ 3228, 3229, 3230; *Crosby v. Day*, 81 N. Y. 242; *Carleton v. Darcy*, 75 id. 375; *Morris v. Wheeler*, 45 id. 708; *Gallagher v. Egan*, 2 Sandf. 742.) It is no valid objection to the order that the government of the United States is made a conditional de-

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fendant in the action. (*Republic of Mexico v. Arrangois*, 11 How. Pr. 1; *Maning v. State of Nicaragua*, 14 id. 518.)

Armour C. Anderson for respondent Stimmel. The court will not, on an application for interpleader, pass upon or determine the validity of the claim or demand of the parties. (*Bleeker v. Graham*, 2 Edw. Ch. 647, 650.) Defendants, having expressed their readiness to pay the amount into the court, should be allowed to do so, leaving the contestants to settle the controversy between themselves as to which is entitled to the amount. (*Van Buskirk v. Roy*, 8 How. Pr. 425; *Johnston v. Lewis*, 4 Abb. [N. S.] 150; *The B. & C. R. R. Co. v. Arthur*, 13 N. Y. Weekly Dig. 333; *Fletcher v. The T. S. B.*, 14 How. Pr. 383; *Dryer v. Rauch*, 42 id. 22; *Ball v. Liney*, 48 N. Y. 6-13; *Bruggleman v. The Bk. of M.*, 1 City Court, 86; *Dows v. Kidder*, 84 N. Y. 121, 134.) They will not be required to exercise any judgment on the subject of conflicting rights of the parties. (1 Wait's Pr. 165; 4 Wait's Actions and Defenses, 150.) Where matters are so entangled that the party is liable to double recovery against him for a valid debt, the court will direct an order of interpleader to be made. (*Board of S. of S. Co. v. Deyoe*, 57 How. Pr. 135.) An order of interpleader may be procured in an action for the foreclosure of a mortgage, where the only question in dispute is the ownership of the mortgage. (*Tanton v. Groh*, 39 How. Pr. 147.) The court had the right to bring in a new defendant. (Code, § 452.) This being an action in equity to foreclose a mortgage, plaintiff is not entitled as a matter of right to costs; they are in the discretion of the court. (*Pratt v. Ramsdell*, 16 How. Pr. 60; *Barlow v. Cleveland*, 16 id. 364; *Morris v. Wheeler*, 45 N. Y. 708; *Losee v. Ellis*, 20 Hun, 655.) The United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. (*Murray v. H. L. & I. Co.*, 18 How. [U. S.] 283; *People of the S. of M. v. The P. B. of N. Y.*, 4 Bosw. 382; *Manning v. The State of Nicaragua*, 14 How. Pr. 517.) The fund being in this State, and the claim of the

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United States being interposed within this jurisdiction, it is most proper that the courts of this State should be able to obtain full jurisdiction over the parties. (*Mut. L. Ins. Co. v. Blake, Exr*, N. Y. Daily Reg., Dec. 27, 1881.)

TRACY, J. No suit can be brought against the United States without the consent of Congress. (*Marriott v. Brune*, 18 How. U. S. [Curtis] 285.) But the United States may sue its debtor in any court of law having jurisdiction of the subject matter. (Ib.)

The attorney of the United States for the district in which the action is brought is the proper officer to bring such action. (U. S. R. S., § 771.)

The United States while nominally a defendant is in fact made a plaintiff by the order appealed from. It comes in not to defend an action brought against it, but as a claimant to the fund in question.

The next and more difficult question raised by the appeal is, whether the United States can, in the present action pending in the State court, enforce its claim to the fund in question. Under the decisions of this court it certainly cannot. (*Thurber v. Blanck*, 50 N. Y. 80) It has no judgment against its alleged debtor, Harrison Johnston, the former owner of the bond and mortgage, and may never have. Had the attachment been issued in an action pending in the courts of this State, a different question would be presented. But the action in which the attachment was issued was pending in the Circuit Court of the United States, a court not bound to follow the decisions of a State court.

Such court may hold that the United States, by service of the attachment, did acquire a lien upon the debt. But by voluntarily appearing in a State court as a claimant to a fund in such court the United States subjects itself to the jurisdiction of such court, and like any other litigant will be bound by its decision. It is insisted that as the plaintiff's action is against other defendants, upon whom the warrant of attachment had not been served, it should be permitted to proceed

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against them as if no attachment had been issued. The liability of the several defendants is for the same debt; payment made by any one of them will satisfy the plaintiff's claim against all. The debt has been paid, by paying the amount with costs of the action into court.

The only remaining question to be determined is, whether the plaintiff or the United States own the fund, and in this question none of the former defendants have now any interest.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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SAMUEL BONNELL, JR., Respondent, *v.* CHESTER GRISWOLD, Impleaded, etc., Appellant.

ELI W. BLAKE, Respondent, *v.* Same Appellant.

Where, in an action against the trustees of a manufacturing corporation to enforce the liability imposed by the Manufacturing Act (§ 15, chap. 40, Laws of 1848), for the making of a false report, the sole falsity of the report alleged is in a statement that the capital stock has been paid up in full, without stating that all or a portion was paid for in property, as is required by the act of 1853 (Chap. 333, Laws of 1853), when such is the case, to sustain the action proof is necessary of some fact or circumstance indicating bad faith, a willful or fraudulent purpose on the part of defendants; the penalty follows an actual, not a constructive falsehood.

Where a referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law.

(Argued April 14, 1882; decided May 2, 1882.)

APPEALS from judgments of the General Term of the Supreme Court, in the third judicial department, entered upon orders made September 20, 1881, which affirmed judgments in favor of plaintiffs, entered upon decisions of the court on trial at Special Term.

These actions were brought by plaintiffs as judgment creditors of the Iron Mountain Company of Lake Champlain, a cor-

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poration organized under the General Manufacturing Act (Chap. 40, Laws of 1848), against defendants, as trustees of said corporation, to recover certain debts of the company: First. Because of an alleged omission of the company to make and file the annual report required by that act (§ 12) in January, 1870. Second. Because of the making and filing of a false report. Third. Because of an alleged conspiracy on the part of the defendants and the organization of the company in pursuance thereof for fraudulent purposes and the making of said report to deceive the public and plaintiffs, whereby plaintiffs were deceived and induced to give the credit.

The case first entitled has been reported on former appeals in 68 N. Y. 294, and in 80 id. 128.

A report for January, 1870, was made and filed certifying as follows: "That the capital stock of said company is two millions of dollars, that said capital stock has been paid up in full." No part of the capital stock was paid in cash, but was claimed to have been issued in payment for property.

The further material facts are stated in the opinion.

Wm. C. Holbrook for appellant. The report was not such a false report as would render defendant liable under section 15, chapter 40, Laws of 1848. (*Oliquot's Champagne*, 3 Wall. 114; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Earl of Beauchamp v. Winn*, S. G., Eng. & Sc. App., 6 H. of L. 223-34; *Arnould on Insurance*, §§ 182, 199.) To render defendant liable as for an over-valuation it was incumbent on plaintiff to prove that he with the other trustees deliberately and with knowledge of the real value of the property over-valued it, and paid stock for it in an amount which they knew was in excess of its actual value. (*Douglass v. Ireland*, 73 N. Y. 100; *Brockway v. Ireland*, 61 How. Pr. 372; *Schenck v. Andrews*, 46 N. Y. 589; S. C., 57 id. 133; *Boynton v. Hatch*, 47 id. 225; *Boynton v. Andrews*, 63 id. 93.) Where findings of fact conflict, the defeated party is entitled to those most favorable to him in aid of exceptions to conclusions of law. (*Schwinger v. Raymond and ors.*, 83 N. Y. 192-9; *Corbin v. Gordon*, 12 Weekly Dig. 570-1.)

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Samuel Hand for respondent. The report of 1870, signed by the defendant Griswold, was a false report within section 15 of the act of 1848, to his knowledge, because it stated that the capital stock had been paid up in full, instead of stating, that the stock had been all issued in payment of mines, etc., conveyed to it. (Laws of 1848, p. 57, § 15; Laws of 1853, p. 705, § 2; 3 Stat. at Large, 736, § 15; *Bonnell v. Wheeler*, 80 N. Y. 128. And see *Pier v. George*, 20 Hun, 210; *Waters v. Quimby*, 27 N. J. L. 198, 296; *Quimby v. Waters*, 28 id. 533; *People v. Contracting Board*, 27 N. Y. 378; *Comm. v. Wyman*, 8 Metc. 247.) The stock to the extent of \$1,400,000 being illegal to the knowledge of the defendant when he signed the report, he is liable for making such false report. (*Boynton v. Hatch*, 47 N. Y. 225; *Boynton v. Andrews*, 63 id. 100; *Douglass v. Ireland*, 73 id. 100; *Waters v. Quimby*, 27 N. J. L. 198, 296; *Quimby v. Waters*, 28 id. 533.) The report having been made with knowledge of the facts, it was intentionally false within the statute. (*Van Ingen v. Whitman*, 62 N. Y. 513, 518, 519, 520; *Gardner v. People*, id. 299; *Fielder v. Darrin*, 50 id. 438; 7 Wait's Act. and Def. 603; *Quimby v. Waters*, 28 N. J. L. 533, 537; *People v. Brooks*, 1 Denio, 457; *Clark v. Miller*, 54 N. Y. 528, 534; Broom's Legal Maxims, 255; *People v. Brooks*, 1 Denio, 457, 458; *People v. Bogart*, 3 Park. 143, 173; *Upton v. Tribilcock*, 1 Otto, 45, 50, 51; *Marsh v. Falker*, 40 N. Y. 562; *Chester v. Comstock*, id. 575; *Meyer v. Amidon*, 45 id. 169; *Bennett v. Judson*, 21 id. 240.)

FINCH, J. The right of recovery in these actions was put by the pleadings upon three grounds. It was alleged, first, that no report as required by law had been made by the Iron Mountain Company; second, that what was claimed to have been such report was false in a material representation; and, third, that the organization of the company was a fraudulent conspiracy designed to deceive and defraud the public. The first cause of action was not sustained. The report, whether

true or false, was a compliance with so much of the law as required it to be made. This point was settled on a previous appeal. (80 N. Y. 128.) The third cause of action, founded upon an alleged conspiracy, was defeated by an adverse finding upon the facts by the trial court. That court, however, permitted a recovery upon the second cause of action, under section 15 of the act of 1848, on the ground that the report was false in a material representation, in that it did not state the amount or proportion of capital stock, issued for property, according to the fact, and was known to the defendant to be so false at the time it was made. The recent case in this court of *Pier v. Hanmore* (86 N. Y. 95) enables us to say without further discussion that the report in this case contained an untrue representation as to the amount of capital paid in, and that such representation was material. The report stated that the capital stock of the company was two millions of dollars and had been "paid up in full." We held that such a representation in the report imported that the capital had been paid in cash, where it was not specified that the whole or some part had been paid in property.

But in this case, as in the one referred to, the important question is left, whether the defendant signed the report "knowing it to be false," within the meaning of the statute. In both cases the signers of the report knew it to be false, in the sense that they knew that the whole capital had not been paid in, in cash. But in *Pier v. Hanmore* we required something more than that, and declared the rule to be that "to charge the officer with the severe penalty imposed for signing a false report knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, willfully, or for some fraudulent purpose, and not ignorantly or inadvertently, and this is a question of fact which must be passed upon before the liability can be adjudged." But the necessity of such proof of a willful and fraudulent purpose we confined to a case where the sole falsity of the report originated in our construction of its import, as meaning a payment in cash, although not so stated in express terms, and where, as a conse-

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quence, it was possible for the officer to have signed what we construe to be a falsehood, but what, as he understood it, might have been a truth. In such a case it is just to require that some evidence of bad faith, something indicating a consciousness of falsehood instead of a belief of truth, should be given. In other words, the penalty follows an actual and not a constructive falsehood; one known and understood to be such and not possibly believed to be otherwise.

So far then as the liability of the present defendant is claimed to attach by reason of the constructive falsehood of his report, as importing full payment *in cash*, it was necessary for the plaintiff to show bad faith and an intent to deceive. No such fact was found. On the contrary, the trial court have made an express finding that in signing the report "the defendant did *not* act in bad faith," and "had no intention thereby of deceiving or defrauding the plaintiff or any other person." In the face of this finding it was impossible for the trial court to hold the defendant liable, because he knew that the capital was paid in property and not in cash. If the penalty was incurred we must find its justification elsewhere.

It is argued that such justification exists in the fact claimed to be proven, that the defendant knew that the capital, although paid in property, was not *fully* paid up, for the reason that he knew it to be actually worth not to exceed \$600,000; that he knew that the Kingdom company, which was the vendor of the property purchased through the intermediate agency of Remington, received as consideration of the sale only one half of the capital stock of the Iron Mountain Company, or one million of stock instead of two millions; and that he knew that the remainder in the hands of Remington was partly given away to its stockholders, transferred as commissions for obtaining a loan, and used as so much working capital. These facts certainly tend to the result asserted, but we are again embarrassed by the findings of the trial court which seem to be contradictory. It is found that the defendant was informed by parties of skill and experience, and having the necessary knowledge, that the property bought of the Kingdom company

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was very valuable, and that two millions of dollars was not a large valuation to put upon it, which statements the defendant fully believed to be true; and it is further and expressly found that "the defendant did not know," outside of its not having been paid in cash, "that the entire capital stock of said company had not been paid up in full, or that the property for which said capital stock was issued was not of the value of two millions of dollars." The qualification appended to this finding does not change its force and effect. But there are findings to the exact contrary. In one of them it is stated that the trustees of the Iron Mountain Company, of whom the defendant was one, "valued the property at less than the capital;" and in the first two additional findings it is certified to us as true that the value of the property purchased was not more than \$600,000 and the defendant knew it, and that so much of the stock as was issued in excess of that value was illegally issued. We have to deal with these contradictions. In so doing we must follow the rule we have declared, that where the findings are contradictory those must be applied which are most favorable to the defeated party in aid of his exceptions. (*Schwinger v. Raymond*, 83 N. Y. 192; 38 Am. Rep. 415.) In so doing, we must take as a fact that there was no over-valuation of the property of which the defendant had knowledge, and that he did not know that the capital stock was not paid up in full. Such a conclusion upon the evidence it was possible to reach, and what we think about it, therefore, is immaterial. Taking that as a fact we must disregard the findings which are inconsistent with it.

In this view of the case the judgment was wrong unless we can sustain it upon the theory of a fraudulent conspiracy in the original organization of the Iron Mountain Company. Here again we are met with the difficulty that the question is one of fact and has been found in favor of the defendant. It is expressly found that no fraud was established, and that the third cause of action was not proved. And even in the additional findings, where the mode of organization and the defendant's connection with it was stated in detail, it is added

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that he relied upon the representations of the other parties having knowledge superior to his, and did what he was asked to do as a matter of form, having "no positive opinion or belief" of his own.

It appears to us, therefore, that there has been a mis-trial, and a result reached which we cannot sustain upon the facts certified to us to be true. We can see no ground upon which we can affirm the judgment which does not involve a contradiction of one or more of the findings of fact made by the trial court.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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JAMES CARSON BREVOORT, Appellant, v. THE CITY OF BROOKLYN,
Respondent.

Where the verification of an assessment-roll in the city of Brooklyn was by affidavit containing the statements "provided by law in regard to assessments in the different towns of this State," but omitted the statement required by the charter of said city (§ 81, tit. 4, chap. 384, Laws of 1854, as amended by § 21, chap. 63, Laws of 1862), to the effect that the assessors "have together personally examined, within the year past, each and every lot and parcel of land, house, building or other assessable property within the ward." *Held*, that the omission was a substantial defect which invalidated the tax and a sale made because of non-payment thereof; and that plaintiff, who had purchased at the sale, under an agreement with the city that in case of any irregularity in the proceedings prior to the sale, the purchase-money should be refunded, could, after demand and refusal, recover back the moneys paid.

A lot was bid off by the registrar of arrears for the city, and a certificate of the sale issued which the registrar sold and assigned to plaintiff under a similar agreement. *Held*, that the registrar had authority to bid in the land, sell the certificate and warrant the validity thereof.

Brevoort v. City of Brooklyn (18 Hun, 383), reversed.

(Argued April 19, 1882 ; decided May 2, 1882.)

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APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made July 18, 1879, which reversed a judgment in favor of plaintiff, entered upon an order overruling a demurrer to the complaint and which sustained the demurrer and directed judgment thereon. (Reported below, 18 Hun, 383.)

The substance of the complaint is stated in the opinion.

John J. Townsend for appellant. The supervisors had no jurisdiction to levy the taxes because the assessors failed to verify the rolls according to law. (Charter of Brooklyn, 1854, title 4, § 64 [Bishop's edition of 1873], p. 69; Laws of 1854, p. 870, chap. 384, title 4, § 31; Laws of 1862, p. 193, chap. 63, § 21, amending the charter of 1854; Laws of 1865, pp. 1438, 1439, chap. 721, § 7; chap. 176 of Laws of 1851, § 8; *People v. Suffern*, 68 N. Y. 326; *Van Rensselaer v. Whitbeck*, 7 id. 517; *Westfall v. Preston*, 49 id. 349, 355; *Bellinger v. Gray*, 51 id. 610, 620; *Bradley v. Ward*, 58 id. 402, 406; *Merritt v. Village of Port Chester*, 71 id. 309, 312; *Ayres v. Moulton*, 51 Vt. 115, 119; *Marsh v. Supervisors of Clark Co.*, 42 Wis. 520-514.) The special agreement to refund the purchase-money can be enforced. (*Dill v. The Inhabitants of Wareham*, 48 Mass. [7 Metc.] 438; *Gas Co. v. San Francisco*, 9 Cal. 453; *Peterson v. The Mayor*, 17 N. Y. 449; *Supervisors v. Schenck*, 5 Wall. 772, 782; *Pendleton County v. Avery*, 13 id. 297, 305; § 17, title 8, charter of 1783; see, also, chap. 62, Laws of 1862, § 31, p. 198, amending § 32, title 5 of charter of 1854.)

John A. Taylor for respondent. A substantial compliance with the form prescribed by the statute was all that was required to give the assessors jurisdiction over the subject-matter of the rolls. (*Matter of Petition of Roberts*, 81 N. Y. 62; *Parish v. Golden*, 35 id. 462.) The presumption obtains that the assessors, being public officers, discharged their whole duty in making the examination required, even to taking oath that they had made such examination. (Cowen and Hill's Notes, 1291, 1292; *Downing v. Ruger*, 21 Wend. 178; *In re Will*

Opinion of the Court, per EARL, J.

of *John Kellum*, 52 N. Y. 517.) The oath set forth in the complaint was a sufficient verification of the tax-rolls. (Laws of 1881, chap. 176, § 8.) If the omission complained of is more than a mere irregularity and constitutes a jurisdictional defect, still the plaintiff cannot recover since in that case the proceedings were void upon their face and his payment was voluntary. (*Guest v. City of Brooklyn*, 69 N. Y. 514; *Peyser v. Mayor*, 70 id. 500; *Railroad v. Marsh*, 12 id. 308; *Sanford v. Mayor*, 12 Abb. Pr. 23; *Fleetwood v. City*, 2 Sandf. 475; *Trinity Church v. Mayor*, 10 How. Pr. 138; *Purcell v. Mayor*, 43 N. Y. Sup. Ct. 348; charter of 1854, p. 78, §§ 11, 13; also p. 85, § 32; *Lynde v. Town of Melrose*, 10 Allen, 49; Cooley on Taxation, 572.) The collector and registrar had no authority to bind defendant by a promise to repay. It was, therefore, *nudum pactum* as to both. (Charter of 1854, Laws of 1862, chap. 63, title 5, § 26; *Packard v. Inhabitants of North Limerick*, 34 Me. 266; *Lorillard v. Town of Monroe*, 11 N. Y. 392; charter of 1873, Laws of 1873, chap. 863, title 7, § 2; charter of 1873, title 8, §§ 1, 5.)

EARL, J. The complaint alleges that at a tax sale held in the city of Brooklyn in June, 1864, for unpaid taxes assessed in 1862, the plaintiff purchased several lots of land and paid therefor in the aggregate \$342.66 and that it was "then and there expressly agreed by the defendant with the plaintiff that if there was any irregularity in the proceedings prior to said sale the said purchase-money should be repaid to the plaintiff, provided the certificates which were then and there delivered to the plaintiff and numbered be surrendered to the collector;" that the taxes assessed, on the lots so purchased, for the year 1862 were void because the assessment-roll was not at the time it was delivered to the board of supervisors, or at any other time, sworn to or verified as required by law; that the plaintiff, on the 11th day of April, 1878, tendered such certificates to the registrar of arrears, to the collector of taxes and assessments, and to the comptroller of the city, and offered to surrender the same to each of them; and the complaint also alleges that in

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October, 1875, at a public auction held by the registrar of arrears in the city of Brooklyn for the sale of property for unpaid taxes pursuant to law, the city of Brooklyn purchased a lot of land assessed for the taxes of 1872, and a certificate of the sale was made to it, which certificate contained a provision that if any irregularity should be discovered in the proceedings prior to the sale, the purchase-money should be repaid to the purchaser or his assigns, provided the certificate should be surrendered to the registrar of arrears; that in March, 1878, the plaintiff paid to the registrar at his request the sum of \$623.80, being an amount equal to an amount which would be required to redeem the lot sold on the day last mentioned, whereupon the registrar, for and in consideration of such payment, assigned to him all the right, title and interest of the city in the certificate and delivered the same to him, and that he has ever since been the holder and owner thereof; that the tax for which the sale was made was void because the assessment-roll for the year 1872, in which the tax was laid, was not sworn to or verified as required by law; that in April, 1878, he tendered the certificate to the registrar of arrears and to the comptroller of the city and offered to surrender the same to each of them; that on the 11th day of April, 1878, he presented a claim for the repayment to him of the two sums of money before mentioned, with interest, to the chief fiscal officer of the defendant; and judgment was demanded for the two sums with interest. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term, and upon appeal to the General Term it was sustained and judgment given thereon to the defendant.

Section 31 of title 4 of chapter 384 of the Laws of 1854, as amended by section 21 of chapter 63 of the Laws of 1862, requires that the corrected assessment-roll of each ward in the city should be sworn to by at least two of the assessors, "according to the oath provided by law in regard to assessment-rolls in the different towns in this State," and further to the effect that "they have together personally examined, within the year past,

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each and every lot or parcel of land, house, building or other assessable property within the ward." The plaintiff alleges that the only verification of the assessment-roll was by an affidavit containing the statements provided by law for assessment-rolls in the different towns in this State, and a copy of the oath attached to each of the assessment-rolls is annexed to the complaint; but the further oath as to the personal examination of each and every lot or parcel of land within the year was wholly omitted. The claim of the plaintiff is that this defect in the assessment-rolls rendered them wholly void, and that the tax sales made under them were absolutely void, and we are of that opinion.

It was the duty of the assessors to make a fair, just and intelligent assessment of property liable to taxation, so that the burden of taxes could be equally and ratably distributed among the tax payers; and to secure a faithful performance of that duty the law required a prescribed oath to be taken. The purpose of the oath was to require, not only a valuation of the real estate to be assessed, but also a personal examination of all the parcels of real estate within the preceding year, so that the valuation might be intelligently and properly made.

Before the property of one can be compulsorily taken for the payment of taxes or assessments, the substantial requirements of the statute intended for his benefit or protection must be strictly followed. In *Van Rensselaer v. Witbeck* (7 N. Y. 517), the certificate, which the assessors of the town were then required to annex to the assessment-roll, was defective, and it was held that where a statute prescribes the form of the certificate to be signed by the assessors and attached to their roll, a substantial compliance with its terms is necessary to give jurisdiction to the board of supervisors to impose a tax and issue their warrant to the collector thereon, and that without such a certificate the assessment-roll is fatally defective. The broad doctrine of that case is now the well-settled law of this State. In *Westfall v. Preston* (49 N. Y. 349), ALLEN, J., speaking of that case, said: "The salutary doctrines of that

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case cannot be disregarded without encouraging a laxity in the discharge of official duty and endangering the rights of the citizen." He also said: "A substantial compliance with the statute in the measures preliminary to the taxation of persons and property in all matters which are of the substance of the procedure and designed for the protection of the tax payer and the preservation of his rights is a condition precedent to the legality and validity of the tax," and that a substantial compliance with the terms of the statute prescribing the verification of the assessment-roll is necessary to give the board of supervisors jurisdiction to impose a tax and issue their warrant to the collector for its collection. In that case the verification of the assessment-roll was made before the time for its final completion, to-wit, the third Tuesday of August, and it was held to be an absolute nullity, and that the supervisors had no jurisdiction to impose a tax upon the persons or property named in the assessment-roll. In *Bellinger v. Gray* (51 N. Y. 610), Mr. Commissioner REYNOLDS held that an assessment-roll not verified by one of the assessors, and not accompanied by a certificate of the other assessors, stating the cause of such omission (1 R. S. 394, § 30), was defective, and that the omission to properly verify it was fatal to its validity. In *Bradley v. Ward* (58 N. Y. 401), CHURCH, Ch. J., said: "There is no question but that the affidavit of the assessors, substantially in the form prescribed by the statute, must be attached to the roll in order to give the supervisors jurisdiction to levy the tax, and that a defect in this respect renders their proceeding invalid, and this is an indispensable condition to the validity of their action." In *People, ex rel. Gillies, v. Suffern* (68 N. Y. 321), it was said that "for the purpose of securing equality of assessment and taxation among the tax payers the law prescribes a particular oath calculated to secure that end, and until the assessment has the sanction of that oath it has no validity as an assessment, it cannot form the basis of taxation, and can in no sense be said to be finally completed." In *Merritt v. Village of Portchester* (71 N. Y. 309), the commissioners of estimate and assessment appointed under the charter of the village of Portchester

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(Chap. 818, Laws of 1868), to apportion and assess the expense of a local improvement, instead of taking the oath "faithfully and fully to discharge the duties" required by the charter to be taken before they were authorized to act, each took an oath that he would perform the duties "to the best of his ability;" and in an action to restrain the collection of the assessment it was held that the failure to take the prescribed oath rendered the proceedings illegal. The case of *Marsh v. The Supervisors of Clark County* (42 Wis. 502) is a very instructive case to the same effect.

In the opinion at General Term, and in the brief of the defendant's counsel, some reliance is placed upon the cases of *Parish v. Golden* (35 N. Y. 462), and *The Buffalo and State Line Railroad Company v. The Board of Supervisors of Erie County* (48 id. 93), upon the point now under consideration. In *Parish v. Golden*, the defect in the affidavit of the assessors was trifling, and it was sufficient for the decision of that case to hold that the defect was not substantial; and for more than that it has not, upon the point now under consideration, been regarded as authority. In *Buffalo and State Line Railroad Company v. The Board of Supervisors of Erie County*, all that was decided was that the affidavit to the assessment-roll in that case was a substantial compliance with the statute. In neither of these cases was anything decided which gives countenance to the claim that the oath required by law may be wholly omitted or departed from without rendering the assessment and tax void. Where there has not been a substantial compliance, in imposing taxes, with the statute in matters intended for the benefit and protection of tax payers, the taxes cannot be upheld upon the presumption that the assessors performed their official duty; it must appear that they performed their duty. Here it was their duty to take the prescribed oath, and that is made by the law the only evidence that they had made the annual examination of real estate liable to taxation which the statute requires. The portion of the oath here omitted was quite substantial; it was designed to secure the performance of an important duty in the faithful discharge of which

the tax payers were greatly interested. If that portion of the oath could be omitted, the whole oath could as well be omitted and thus the tax payers be entirely deprived of the sanction of an oath in the taxation of their property.

It is clear, therefore, that these taxes were void and that the sales made for their non-payment were also void. It is true, as claimed by the defendant, that the invalidity of the assessments appears upon the face of the assessment-rolls, and undoubtedly if the plaintiff had paid his money, as a simple purchaser at a tax sale, without any agreement for repayment in case any irregularity should exist or be discovered, he could not have recovered back the money thus paid. In such a case he would buy without warranty, and take such a title as the tax sale would give him. (*Lynde v. The Town of Melrose*, 10 Allen, 49.) But here it is alleged that at the sale made in 1864, the defendant expressly agreed that the purchase-money should be repaid if there was any irregularity in the assessment and tax proceedings prior to the sale. It is not alleged how that agreement was made by the city. Under the allegation the plaintiff could prove the making of the agreement in any way. The city was interested in this tax sale and was entitled to a portion or all of the proceeds thereof, and it cannot be said that it was not competent to make the agreement in some form, either by an ordinance of its common council, or by the action of some officer who had been for a long time accustomed, with the knowledge and acquiescence of the legislative and executive officers of the city, to make such agreements.

It matters not that there is no allegation in the complaint that the money paid at the sale in 1864 was paid into the city treasury for the benefit of the city. It is sufficient that the city was interested in the sale and entitled to at least a portion of the proceeds thereof. As to the tax sale made in 1875 the registrar of arrears had the right to bid in the land for the city under section 18 of title 8 of chapter 863 of the Laws of 1873, and he had the power, under section 19, to sell the certificate to the plaintiff, and by section 20 it appears that the money received by him for such assignment must be applied for the

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benefit of the city. It cannot be doubted that the city could upon such a sale warrant the validity of the certificate.

We are, therefore, of opinion that the complaint stated a good cause of action against the defendant, and that the demurrer was not well taken, and that the judgment of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur, except TRACY, J., not voting.

Judgment accordingly.

CHARLES H. GETMAN, as Assignee, etc., Appellant, v. THE
SECOND NATIONAL BANK OF OSWEGO, Respondent.

In an action brought by plaintiff as assignee in bankruptcy of A. to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest (U. S. R. S., §§ 5197, 5198), defendant interposed as a defense and proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff thereupon gave in evidence the record of a judgment in his favor in an action in which plaintiff as assignee sued defendant to recover a payment made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment, as, to annul the release, plaintiff was bound to show, not only that at its date defendant had reasonable cause to believe A. to be insolvent, but that he executed it in fraud of the act (U. S. R. S., §§ 5128, 5129, as amended by § 11, chap. 390, Laws of 1874); that proof that a prior payment made by A. to defendant was a fraudulent preference, known to be such, did not establish that a payment by defendant to A. of a debt due the latter was either fraudulent or known to be such.

(Argued April 2, 1882; decided May 2, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made at the June term, 1881, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

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The nature of the action and the material facts appear in the opinion.

Geo. W. Parkhurst for appellant. The question of "reasonable cause to believe said Ames insolvent," as well as that of insolvency, was *res adjudicata* and conclusive. (*Hudson v. Spencer*, 7 J. & Sp. 452; *Blair v. Bartlett*, 75 N. Y. 150; *Doty v. Brown*, 4 id. 71; *Castle v. Noyes*, 14 id. 329.) The instrument purporting to be a release was a disposition of property "not made in the usual and ordinary course of business" of said Ames and was *prima facie* fraudulent, and the referee erred in refusing so to find. (Bouvier's Law Dictionary; *Wheelock v. Lee*, 64 N. Y. 242; U. S. R. S., §§ 5129, 5130; Bump on Fraudulent Conveyances, 575-576; *Collins et al. v. Bell*, 3 B. R. 587; *Scammon v. Cole*, id. 393; *In re Hunt*, 2 id. 539, cited in Bump on Bankruptcy [10th ed.], 852; *Navy v. Merritt*, 8 Allen, 451; *Tuttle v. Truax*, 1 B. R. 169; *Rison v. Knapp*, 4 id. 342; *Babbitt v. Welburn*, id. 121; *Bruce v. Kelley*, 7 J. & Sp. 27.) The release is void as against public policy. (1 Wait's Actions and Defenses, 700; *Bosler v. Rheem*, 72 Penn. St. 54; *Clark v. Spencer*, 14 Kans. 406; *Mabee v. Crozier*, 22 Hun, 264.)

W. H. Kenyon for respondent. The sealed receipt and release of George Ames conclusively established that the penalties, to recover which this action is brought, were fully paid by defendant to Ames before the bankruptcy proceeding was instituted. (2 Edm. Stat. 423, § 77 [2 R. S. 406]; *Home Ins. Co. v. Watson*, 59 N. Y. 390-395; *Thalhimer v. Brinckerhoff*, 6 Cow. 90-102; Code, §§ 1337, 1338; *Baker v. Spencer*, 47 N. Y. 465, 562, 563, 564; *Vermilyea v. Palmer*, 52 id. 471-475, 476; *St. Luke's Home v. Asylum for Indigent Females*, 52 id. 191-199; *Spencer v. Spencer*, 11 Paige 299-304; *Clark v. Davenport*, 1 Bosw. 95, 96, 110; *People v. Snyder*, 41 N. Y. 397-402; *Seymour v. Van Slyck*, 8 Wend. 403, 404, 414.) No provision of the Bankrupt Act forbids payment to, or receiving payment by, an insolvent of any claim

or demand in his favor at any time prior to the commencement of bankruptcy proceedings. (*Smith v. Teutonia Ins. Co.*, 6 L. N. 130; Bump's Bankruptcy [10th ed.], 420.) In order to invalidate the release it is necessary to establish that George Ames knowingly executed it in fraud of the Bankrupt Law. (U. S. Rev. Stat., §§ 5128, 5129, as amended by § 11 of chap. 390 of Laws of 1874; *Guernsey v. Miller*, 80 N. Y. 181-184.)

FINCH, J. The plaintiff, as assignee in bankruptcy of George Ames, sued upon sixty-four causes of action, each of which alleged that the defendant had charged and received usurious rates of interest on loans and discounts to Ames, and the firm of Ames & Tanner, whereby the bank became liable to refund double the amount under the act of Congress. These causes of action were met and answered by proof that they had been fully paid and satisfied, and the liability of the bank therefor released and discharged by the assignor before the commencement of the proceedings in bankruptcy. That proof was made by the production of a release under seal executed by said Ames, acknowledging full payment and satisfaction of all claims for excessive interest and releasing the bank therefrom. The contest thereafter turned upon the validity and effect of this release. The plaintiff attempted to render it ineffectual, by bringing it within the condemnation of the Bankrupt Act. The only evidence he gave was the record of a previous judgment between the same parties in which the plaintiff sued as assignee to recover certain payments made to the defendant, on the 31st day of March, 1877, being about a month earlier than the date of the release, as having been made when the debtor was in fact insolvent, and when the creditor had reasonable cause to believe in the existence of such insolvency, and knew that such payment was made in fraud of the provisions of the Bankrupt Act. These facts were decided in plaintiff's favor in that action, but they do not prove the plaintiff's case in this. To annul the release he was bound to show not only that at its date the defendant had reasonable cause to believe Ames insolvent, but that it knew that he executed it

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in fraud of the provisions of the Bankrupt Act (U. S. R. S., §§ 5128, 5129, as amended by Laws 1874, chap. 390, § 11; *Guernsey v. Miller*, 80 N. Y. 181.) Proof that a payment made by the debtor to the creditor in March, 1877, was a fraudulent preference, known to be such, does not at all establish that payment by the bank to Ames in April, 1877, of a debt due the latter was either fraudulent or known to be such. The exception, therefore, to the refusal of the referee to find that at the date of the release the defendant had reasonable cause to believe Ames insolvent was not well taken. The fact was immaterial, unless further proof was given showing knowledge of a fraud upon the Bankrupt Act. No such proof was given. The plaintiff seeks to supply it by calling it a transaction not in the usual and ordinary course of business of the debtor, and invoking the presumption arising from that fact. (U. S. R. S., § 5130.) But Ames simply collected a debt due him and settled an obligation which he held against the bank. That did not become a matter outside of his usual and ordinary business because the character of the debt was unusual and peculiar. It was collecting back an over-payment. His loans and discounts, his payments of interest, were usual and ordinary, and his settlement of a demand for payment in excess cannot be deemed outside of the usual and ordinary course of business. The further argument that the release was against public policy does not need discussion. We think the defense was complete and properly allowed to prevail.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ELBERT O. FARRAR, as Trustee, etc., Appellant, v. ALEXANDER McCUE, Respondent.

The will of J., after various legacies, gave his residuary estate to three children named; the executors being directed to invest and keep the same invested, to apply the interest to the support and education of said chil-

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dren until they respectively arrived of age ; after that to pay to each the interest upon one-third, and after the death of two of the children to divide the principal between the survivor and the heirs of the two deceased. The executors were empowered to sell and convey the real estate and to invest the proceeds for the purposes of the will. One of the executors died, the others, after paying debts and legacies, and settling the estate in all respects, except as to the sale and distribution of the proceeds of the real estate, resigned. Their resignation was accepted by the Supreme Court and two more trustees were appointed; at this time the three children were living and all were of age. *Held*, that conceding the executors were merely donees of a power of sale, it was a general power and imperative, and so subject to the same statutory provisions as to the substitution of new trustees as are applicable to express trusts; that the new trustees therefore were lawfully substituted and had power to convey; also that the trust or power was not ended by the payment of debts and legacies and settlement of the executors' accounts, as the principal purpose of the will yet remained to be carried out.

F. and H., the new trustees, united in a conveyance of the real estate to E., one of the children interested in the residue, who gave a mortgage thereon, and afterward conveyed it to F. as trustee, H. having meanwhile resigned. F. contracted to sell to defendant subject to the mortgage, he agreeing to have H. join in the deed and also to procure a deed from E. of any interest he might have. Defendant declined to complete the purchase claiming, aside from want of power in the trustees to sell, the sale to E. was only colorable; that the reconveyance subject to the mortgage was unauthorized, and that the resignation of H. was ineffectual because the order accepting it did not show on its face that it was an order of the court. On submission of the controversy under the Code, *held*, that the objections, if tenable, were obviated by the offer to have E. and H. join in the conveyance, and that the title which the testator had could thus be vested.

(Submitted April 24, 1882; decided May 5, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, in favor of defendant, entered upon an order made February 18, 1882, upon a case submitted under section 1279 of the Code of Civil Procedure. The controversy was as to whether defendant, who had entered into a contract with plaintiff, as trustee under the will of Abram W. Jackson, for the purchase of a house and lot of which the testator died seized, was bound to complete the purchase. The will of Jackson after various legacies contained this clause :

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“ *Sixth.*—I give, devise and bequeath all the rest and residue of my estate, both real and personal (after the payment of the above legacies), to my three youngest children, Abram W., Ida Amelia and Ernest in fee. And it is my will, and I do hereby direct my executors to invest all the said rest and residue of my estate either in real estate or in bonds and mortgages and to keep it so invested from time to time, and apply the interest thereof to the support, maintenance and education of my said three children until they shall respectively arrive at the age of twenty-one years, and after they shall respectively arrive at the age of twenty-one years, then it is my further will that my said executors do pay to each of them the interest of his or her respective one-third of said rest and residue, it being my intention to declare hereby that my executors shall pay the said interest to each of my said children as he or she shall arrive at the age of twenty-one years, and that before said time it shall be expended by said executors for the maintenance and education of said children, as long as they remain respectively under the age of twenty-one years. It is my further will that the interest only and no part of the principal of said rest and residue of my estate shall be paid or distributed to my said children so long as any two of them shall survive, and that after the death of any two of my said children the principal and capital of said rest and residue of my estate shall be equally divided between the survivor and the heirs of the two deceased children, it being my intention hereby to devise and bequeath to each of my said three youngest children one equal third of the said rest and residue of my estate, and that, upon the death of each one of them, his or her heirs shall receive the share to which his or her ancestor was entitled.

“ And I do hereby authorize and empower my said executors to sell and convey my real estate for such prices as they shall deem proper, and in fee-simple or any less estate, and to invest the proceeds from time to time in bonds and mortgages or in other productive real estate, for the purpose of carrying out the intentions of this will.”

Three executors were named in the will, all of whom quali-

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fied; one of them died prior to 1879. In that year the other two executors, having paid all the debts and legacies without a sale of the real estate, and having rendered a final account as executors, made application to the Supreme Court to be discharged from the trusts, in which application the three children of the testator, who were then of age, joined. By order of said court the application was granted, and Elbert O. Farrar, the plaintiff, and Frederick R. Hawley were appointed executors and trustees; afterward Hawley made application for leave to resign. The submission contained a copy of an order granting the application, signed by a justice of said court, but not showing on its face that it was an order of the court. Plaintiff and Hawley conveyed the premises in question to Ernest M. Jackson, in December, 1879, who thereafter gave a mortgage thereon for \$5,000, and afterward reconveyed subject to the mortgage to plaintiff as executor and trustee. Plaintiff contracted to sell and defendant to purchase subject to the mortgage; the latter refused to complete his purchase upon the grounds that neither the plaintiff alone nor in conjunction with Farrar had any power to convey under the will; that the conveyance to Jackson was colorable only and not a valid execution of the power; that the purchase by plaintiff of Jackson was not an investment of the funds as prescribed by the will. Plaintiff offered and agreed to procure Hawley to join with him in the deed and also to procure and deliver a deed from Jackson of any interest he might have.

E. H. Benn for appellant. The question is, whether the executors have been discharged, and whether or not Mr. Farrar is now trustee. (*Milbank v. Crane*, 25 How. 192; *McMurray v. McMurray*, 66 N. Y. 175.) No matter what words a testator uses to express his intention, his intention, when it can be ascertained, must govern, and what he intended by the words used is his will. (*Dubois v. Ray*, 35 N. Y. 167; *Post v. Hover*, 33 id. 593; *Roome v. Phillips*, 24 id. 468.) If by the terms of a will a testator gives property to his heirs in fee, and then in the same will gives to his executors control of the prop-

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erty with power to sell, they (the executors) take the fee instead of the heirs. (*Brewster v. Striker*, 2 N. Y. 19, 28; *Tobias v. Ketchum*, 32 id. 319, 331; *Van Nostrand v. Moore*, 52 id. 18.) The fee then was given to the executors as trustees. (*Morse v. Morse*, 85 N. Y. 53.)

J. C. Bergen for respondent. The direction to the executors to sell was simply a power. (R. S., part 2, chap. 1, title 11, art. 3, §§ 95, 127.) Under the provisions of the will no estate vests in the executors, they are simply the grantees of a power. (*Smith v. Brown*, 35 N. Y. 89.) The power in the executors is a general power in trust, which the executors could exercise. (R. S., part 2, chap. 1, title 11, art. 3, § 115; *Kinnur v. Rogers*, 42 N. Y. 535.) The direction to sell is for the benefit of devisees not legatees, and consequently not within the statute. (*Lang v. Ropke*, 5 Sandf. S. C. 303.) A testator may give to his heirs an absolute fee, and at the same time give to his executors a power to sell and pass the entire title. (*Reed v. Underhill*, 12 Barb. 113; *Crittenden v. Fairchild*, 41 N. Y. 289; *Downing v. Marshall*, 33 id. 380, 381; *Garvey v. McDevitt*, 72 id. 563; *Johnson v. Reeves*, 48 How. 505.) So far as the real estate is concerned the executors were trustees and held it as such, and when they resigned and were discharged, it was proper and legal for the court to appoint one or more trustees to carry out the trust. (1 R. S. 730, §§ 69, 71; *Leggett v. Hunter*, 19 N. Y. 445; *Quackenbush v. Southwick*, 41 id. 117; *Broman v. Broman*, 48 How. 481.)

FINCH, J. It is unnecessary to determine whether the executors under the will of Jackson took a legal estate in the rest and residue devised, or were merely donees of a power of sale given them to aid in the ultimate distribution. In the one event they took the fee as trustees, and no estate in the land went to the heirs at law by descent or devise; and in the other the fee passed to the devisees under the provisions of the will, but in either case the executors were at liberty to convey and could transfer a valid and perfect title to a purchaser. There

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were three of these executors. One of them died, leaving the survivors with an unexecuted trust. But these after paying debts and legacies and settling the estate in all respects, except as to the authorized sale and distribution, resigned, and their resignation was accepted by the Supreme Court, which had authority to relieve them from their position. (1 R. S., part 2, chap. 1, title 2, § 69.) By death and resignation no acting trustee remained, and the court was at liberty to appoint new trustees. (§ 71.) Farrar and Hawley were accordingly appointed by an order made at Special Term, and they thus became vested with the power and authority originally given to the executors, unless the first objection made on behalf of the appellant is sound. That is, that the executors under the will had only a naked power of sale which amounted to a personal confidence and trust, and which could not be vested in any new or substituted trustees. But no discretion was given to the executors, nor any choice among beneficiaries. We have recently held that such a trust power as here existed, if no trust estate was created, is a general power in trust and imperative, and subject to the same provisions as to the substitution of new trustees as are applicable to express trusts. (*Delaney v. McCormick*, MSS., Feb. 28, 1882.*) Farrar and Hawley, therefore, were at the date of their appointment lawfully substituted as trustees and had power to convey. (*Crittenden v. Fairchild*, 41 N. Y. 289; *Leggett v. Hunter*, 19 id. 459.) They now offer to deed to the purchaser who is willing to buy, but doubts the safety of the title proposed to be given.

It is very certain that if they cannot convey a good title, it is because they have lost the power to do so by something which has occurred since their appointment, for when that was made they were legally trustees under the will, and had full power to sell the land and convert it into money for the purpose of investment and distribution. The conclusion of the General Term to the contrary goes upon the ground that because the executors had paid all debts and legacies prior to a disposition of the residue, and settled their accounts before the

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surrogate, the trust was at an end and nothing remained to be done for which a trust estate or a power in trust was essential. Such view of the will overlooks its principal purpose, and the most important duty imposed upon the trustees. It remained for them to sell the real estate, to convert it into money, to invest it as directed, to apply the interest to the support and education of each of the three children until twenty-one, at that age to pay over the surplus of interest accrued, and thereafter to pay the interest annually so long as any two of the children survived, and, when only one was left, to make the final distribution. This disposition of his property was the paramount and principal purpose of the will, and so far from being ended has only just begun. The executors and the court both realized the fact when permission to resign was asked. The former put their request upon the express ground that at their age they could not expect to live to carry out their trust; and although they did say in their petition that their duties as executors had been fully performed, and the estate had been duly administered, they plainly recognized and distinctly said that their duties as trustees to carry out and perform the trusts imposed by the will upon the residuary estate remained. We can discern no possible ground for saying that these trusts ended, because debts and legacies had been paid, and the earlier duties of the executors had been performed.

The trust, therefore, remained. Death and resignation took away the trustees. The court properly appointed successors, and these in the moment of their appointment were fully authorized to sell and convey. What they did was this: they united in a conveyance to Ernest M. Jackson, who was one of the devisees interested in the residue. He gave a mortgage upon the property, and then reconveyed to Farrar as trustee, his associate trustee, Hawley, having in the mean time resigned. Two things are said about this transaction. It is claimed that the sale to Jackson was only colorable, and not a valid execution of the power. That may or may not be true. There are no facts to justify any such determination. They reach no further than to suggest possibilities about which it is not our

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duty to speculate. But since Jackson proposes to join in selling to the purchaser, the inquiry is of no consequence. The deed of the trustees was either absolutely void, or voidable, or good. If it was void the power of sale has not been executed, the right to convey for the purposes of the will remains in the trustees, and they can make a good title to the proposed purchaser. If it was voidable, the grantee took subject to avoidance, which would still leave the power of sale unexecuted, and that duty remaining to be performed. If it was good the title passed to Ernest M. Jackson, and if his reconveyance to the trustee subject to the mortgage was unauthorized, the title remains in him. So that, in any event, a conveyance by the trustees and their grantee will cover the entire interest, subject to the mortgage, and provide against all the suggested difficulties. It is further said that Hawley's resignation was ineffectual, because the order accepting it does not, on its face, show that it was an order of the court. But if that be true he remains trustee, and the trouble is obviated by an offer to have him join in the conveyance. In this view of the case it is apparent that the title which the testator had at the time of his death can be vested, subject to the effect of the outstanding mortgage, in the purchaser, and he should be required to complete his purchase.

The judgment should be reversed, and defendant directed to perform his contract accordingly.

All concur, except MILLER, J., absent.

Judgment accordingly.

CHARLES MAPLES, Respondent, v. ALEXANDER W. MACKEY,
Impleaded, etc., Appellant.

Where a judgment by default, of a court of general jurisdiction, recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction or affect the validity of the judgment.

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All intendments are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown.

It seems that upon motion made to vacate a judgment because of informality of the proof of service of the summons, the informality may be cured by amendment.

The statute of limitations was not a defense to a proceeding under the Code of Procedure (§ 375), to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, unless such defense existed at the time the action was commenced. The action was commenced by service of summons on the joint contractor (§ 99), and the proceeding was not a new action but a proceeding at the foot of the judgment.

The provision of said Code (§ 379), giving to the one sought to be charged by such proceeding the right to set up any defense which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better.*

(Argued April 24, 1882 ; decided May 5, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 24, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 22 Hun, 228.)

This proceeding was instituted in 1876 under section 375, of the Code of Civil Procedure, to charge defendant Mackey with a judgment herein.

The action was brought in 1858 to recover an indebtedness contracted by defendants as copartners.

Judgment was entered by default, August 31, 1858. The judgment recited personal service of the summons with copy of complaint upon defendant Angell. The only proof of service which appeared in the judgment-roll was an admission of service signed by Angell. It was proved on the trial herein that such service was in fact made. Mackey interposed as a de-

* By the provision of the Code of Civil Procedure (§ 1937), which is the substitute for section 375 of the Old Code, the proceeding to charge a defendant, not originally served, is made an action. The defendant's answer, however, is expressly restricted (§ 1939) to such defense as might have been made to the original action, had summons been served on the debtor so sought to be charged when it was served upon his joint debtors, to objections to the judgment and to defenses or counter-claims which have arisen since. — REP.

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fense the invalidity of the judgment and the statute of limitations.

Nathaniel C. Moak for appellant. The proof of service of the original summons upon the defendant Angell was not sufficient to confer jurisdiction upon the court or the clerk of Tioga county to enter the original judgment, and that judgment, therefore, was void. (*Bloom v. Burdick*, 1 Hill, 130, 141; Code, § 246; *McCombe v. Mayor of New York*, 17 Abb. 32; *Thomas v. Tanner*, 14 How. 246; Throop's Code, § 434; 5 How. 346; *Wallace v. Wallace*, 4 Porter [Ala.], 120; *Norwood v. Riddle*, 9 id. 425.) The proof of service by the admission of the party does not, as required by section 138 of the Code, state the place of such service, which is necessary to give jurisdiction to the clerk to enter the judgment, and without this the clerk has no authority to enter the judgment, and if he does, it is a nullity. (*Torlan v. Fagan*, 48 How. 240; *Reed v. French*, 28 N. Y. 295; *Kendall v. Washburne*, 14 How. 380.) This pretended written admission does not state the time of the service, and is for that reason defective. (Code, § 138, subd. 4.) A summons must be served by the delivery of a copy thereof. (Code, § 134; 4 How. 375.) The judgment entered in the Tioga county clerk's office being void, it cannot be the foundation upon which to predicate a proceeding, under section 375 of the Code of Procedure, to charge a liability upon the defendant Mackey. (2 Bouvier's Law Dict. 645; *Kendall v. Washburne*, 14 How. 381, 382; 17 Abb. 44-45; 23 Barb. 591; *Hallett v. Righter*, 13 How. 45; *Butler v. Lewis*, 10 Weekly Rep. 541; *Smith v. Fowler*, 12 id. 11; *Borden v. Fitch*, 15 Johns. 141; *Bigelow v. Stearns*, 19 id. 39.) Plaintiff's offer to prove by the defendant Angell the genuineness of the signature to the alleged admission of service indorsed in the summons in the judgment-roll on the judgment entered in Tioga county should have been rejected. (*Bangs v. McIntosh*, 23 Barb. 596, 598; *Borden v. Fitch*, 15 Johns. 121; *Mills v. Martin*, 19 id. 33; *Elliot v. Pussol*, 1 Pet. 328.) All records or judgment must show upon their face that the court had

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jurisdiction of the person. (*Smith v. Fowler*, 12 Vt. 11; *Hallett v. Righter*, 13 How. 46.) Upon the proof in this case the claim against this defendant Mackey is barred by the statute of limitations. (2 R. S. 337, §§ 3, 4; *Oakley v. Aspinwall*, 4 N. Y. 518-521; 30 How. Pr. 284-8; *Oakley v. Aspinwall*, 13 id. 500; *Newman v. Marvin*, 12 Hun, 240; Code, § 379; *Berlin v. Hall*, 48 Barb. 444; 4 Rob. 243; *White's Bank of Buffalo v. Ward*, 35 Barb. 741.) No act or omission of the defendant Angell can affect Mackey after the dissolution of the partnership between them. (*Van Curen v. Parmelee*, 2 N. Y. 530; *Winchell v. Hicks*, 18 id. 560; *Payne v. Gardiner*, 29 id. 178-9. *Schoonmaker v. Benedict*, 11 id. 176; *Bank v. Norton*, 1 Hill, 573; *Mitchell v. Ostrom*, 2 id. 520; *Jackson v. Hoag*, 6 Johns. 58; Code, subd. 1, § 136; 3 R. S. [5th ed. Banks], p. 688, §§ 1-4; *Oakley v. Aspinwall*, 4 N. Y. 518; *Berlin v. Hall*, 48 Barb. 442.) If laws are not plainly repugnant to each other, the later will not be deemed a repeal of the former unless in the one last enacted some notice is taken of the other. (*Bowen v. Lease*, 5 Hill, 221; *Van Rensselaer v. Snyder*, 5 B. R. 302; 13 N. Y. 299.)

Arthur More for respondent. The recital in the judgment that the summons and complaint were personally served on the defendant Angell more than twenty days prior to that date, though not conclusive, is presumptive evidence of its truth. (*Porter v. Bronson*, 29 How. Pr. 292; *Ferguson v. Crawford*, 70 N. Y. 253; *Hatcher v. Rocheleau*, 18 id. 92; *Dunlop v. Edwards*, 3 id. 341; *Catling v. Billings*, 16 id. 622; *Shaettler v. Gardiner*, 47 id. 404; *Alling v. Fahy*, 70 id. 571; *Whitney v. Townsend*, 67 id. 40; *Tucker v. Leland*, 75 id. 186.) An error by the clerk or the attorney, in the performance of that duty, might make the judgment irregular, but would not render it void. (*Farmers' Loan & Trust Co. v. Dickson*, 17 How. Pr. 477; *Cooper v. Shaver*, 41 Barb. 157.) An irregular judgment can only be reviewed by a direct proceeding to vacate it. (*Jones v. U. S. Slate Co.*, 16 How. 129; *Mitchel v. Van*

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Burcn, 27 N. Y. 300 ; *Ingram v. Robbins*, 33 id. 418 ; *Chapel v. Chapel*, 12 id. 222 ; *White v. Bogart*, 73 id. 256 ; *Hunter v. Lester*, 18 How. Pr. 349 ; *Nones v. The Hope Mutual Insurance Co.*, 8 Barb. 541 ; *Peck v. Richardson*, 9 Hun, 567 ; *Grant v. Vandercook*, 57 Barb. 175 ; *Watkins v. Abrams*, 24 N. Y. 72 ; 3 Wait's Pr. 732 ; 3 R. S. [5th ed.] 627 ; *Williams v. Wheeler*, 1 Barb. 48 ; 3 R. S. [5th ed.] 722, 723 ; Code of Civil Procedure, § 721 ; *Pendleton v. Weed*, 17 N. Y. 75 ; *Ferguson v. Crawford*, 70 id. 254.) The judgment in suit is neither void nor voidable, and had a motion been made to set it aside as irregular, the court would have denied the motion, or at most ordered the judgment amended *nunc pro tunc*. The admission of service was sufficient under the Code as it stood at that time. (*People v. Walker*, 23 Barb. 304 ; *Wynehamer v. The People*, 13 N. Y. 395 ; *Tallman v. Barnes*, 12 Wend. 227 ; *Bennett v. Couchman*, 48 Barb. 74 ; *Van Alstyne v. Cook*, 25 N. Y. 490 ; *White v. Bogart*, 73 id. 256.) The plaintiff's right of action is not barred by the statute of limitations. (*Evans v. Cleveland*, 72 N. Y. 486 ; *Garland v. Chattel*, 12 Johns. 430 ; *Gibson v. VanDerzee*, 47 How. 231 ; *Broadway Bank v. Luff*, 51 id. 479 ; *White's Bank of Buffalo v. Ward*, 35 Barb. 643 ; *Merritt v. Scott*, 3 Hun, 659.)

RAPALLO, J. Judgment was entered August 31, 1858, in favor of the plaintiff against Angell and Mackey upon a joint contract. The judgment was by default and recited that the summons and a copy of the complaint had been personally served on Angell, one of the defendants. This recital was sufficient to show that the court had acquired jurisdiction, and even if the proof of service filed with the judgment-roll was defective, that irregularity did not show want of jurisdiction or affect the validity of the judgment. It having been rendered by a court of general jurisdiction, all intendments are in favor of its validity until want of jurisdiction is affirmatively shown. There was no attempt to disprove the recital, but on the contrary, its truth was affirmatively proved on the trial of this proceeding. If a motion had been made to vacate the

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judgment, the informality of the proof of service could have been cured by amendment. (*White v. Bogart*, 73 N. Y. 256.)

It stood, therefore, as a valid judgment against both defendants as joint debtors, and bound their joint property, and the separate property of the defendant served. The present proceeding is not a new action, but a proceeding at foot of the judgment, under section 375 of the Code of Procedure, to make the judgment binding upon the defendant Mackey and his separate property as if he had been originally served. The action had been commenced against him in 1858 by the service of the summons on his co-defendant and joint contractor Angell (Code of Procedure, § 99), and the present proceeding is in the action which had been thus previously commenced.

The statute of limitations is no defense to this proceeding, unless such defense existed at the time the action was commenced. There is no statute which limits the time within which such a proceeding must be instituted. Section 379 of the Code of Procedure, as it stood when this proceeding was instituted, authorized the defendant to deny the judgment, or set up any defense thereto which may have arisen subsequently, and in addition, to make any defense which he might originally have made to the action. He was under this section at liberty to show that the judgment had been paid or otherwise discharged, and if twenty years had elapsed probably the presumption of payment would have applied. But the action having been commenced in due time, by service on his co-defendant, he cannot sustain the defense of the statute of limitations. The statute places him with regard to his defense in as good a position as though judgment had not been entered, but in no better.

The judgment should be affirmed.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

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THE PEOPLE, ex rel. HENRY C. ADAMS, Appellant, v. ZERAH S. WESTBROOK, Surrogate, etc., et al., Respondents.

A writ of prohibition is not demandable as matter of right, but of sound judicial discretion.

An order of the General Term of the Supreme Court, therefore, denying the writ is not reviewable here.

It seems that the writ should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law, or in equity, or by appeal.

The history of the writ in England stated, and the authorities collated.

(Submitted April 25, 1882 ; decided May 5, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 20, 1881, which affirmed an order of Special Term, denying an application on the part of the relator for a peremptory writ of prohibition.

The nature of the writ sought for and the material facts are stated in the opinion.

H. C. Adams, relator, in person. Irrespective of the pendency of the equity suit, the claims of the relator were purely of equitable cognizance, and involved the performance of a trust and the disposition of a trust fund, and therefore were subject-matters not embraced in nor referable under the statutes authorizing proofs or references of disputed claims. (*McNulty v. Hurd*, 72 N. Y. 520.) A writ of prohibition will issue where the subject-matter is not within the jurisdiction of the inferior tribunal. (3 Broom & Hadley's Com. 459 ; 20 N. Y. 531, 541-2 ; 4 Keyes, 136, 146-7 ; *McNulty v. Hurd*, 72 N. Y. 520.)

J. E. Dewey for respondents. In proceedings under the statute to sell real estate to pay debts of decedents, the surrogate has jurisdiction of disputed claims, and to hear and determine all claims of creditors, and distribute the fund arising from sales among the creditors establishing their claims before him.

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(Code, §§ 2755, 2756, 2757, 2758, 2761, 2788 ; 2 R. S. [Edm. ed.] 105, 111, marg. pp. 102, 107, §§ 10, 42 ; *Hopkins v. Van Valkenburgh*, 16 Hun, 3, 5-7 ; 61 How. 137, 140-2 ; *Estate of Dolan*, 1 N. Y. Bull. 79 ; Opinion of Surr. of N. Y., Dayt. Surr. [3d ed.] 603, 619 ; *Magee v. Vedder*, 6 Barb. 357-8 ; Opinion of D. B. Ogden, Surr. of N. Y. ; *Colson v. Brainard*, 1 Redf. 328-9 ; Redf., etc., Surrogates' Courts [Ed. of 1881], 611.)

RAPALLO, J. The relator has certain equitable claims against the estate of Peter G. Fox, deceased, upon which he brought an action against Fox in his life-time in the Supreme Court. A decision was rendered in that action, in favor of the relator, and judgment was entered on such decision, but the judgment was set aside on the ground that Fox had died before the findings and conclusions of the trial judge were signed, and the action was ordered to proceed as if no decision or findings had been signed. The relator, therefore, stands as plaintiff in an equitable action pending in the Supreme Court against Peter G. Fox, now deceased.

The surrogate of Montgomery county has ordered the real estate of Fox to be sold for the payment of his debts. The sale has been made, and the proceeds are in the hands of the surrogate for distribution.

The surrogate has published the usual order requiring all persons having claims or demands against the estate of the deceased to exhibit and prove the same before him, and for distribution of the fund among the creditors.

The relator filed with the surrogate, papers showing that he had the equitable claims before mentioned, and that an action therefor was pending in the Supreme Court, and he insisted to the surrogate, and now claims, that the surrogate had no jurisdiction to compel him to submit his equitable claims to adjudication in the Surrogate's Court, and that they, being the subject of an action pending in the Supreme Court, could not be withdrawn from the jurisdiction of that court, and that the surrogate should be restrained from adjudicating upon his claim and from

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distributing the fund, until the relator's claims shall have been adjudicated upon in his action pending in the Supreme Court. He also claims that the proceeds of sale of the real estate of Fox are impressed with a trust for the payment of the judgments before mentioned, in preference to the claims of other creditors.

For the purpose of enforcing these positions he instituted the present proceeding. He obtained an alternative writ of prohibition, directed to the surrogate and to the executor, prohibiting them from proceeding in the matter of proving, examining, deciding upon or intermeddling with the claims of the relator so pending and awaiting adjudication in the Supreme Court, and from making any adjudication in respect of the claims of other creditors of the estate inconsistent with or in any manner prejudicial to the rights and claims of the relator, until the final judgment of the Supreme Court in said action; and then only in accordance therewith. Also from making any distribution of the fund and from giving notice of such distribution until such final judgment, etc., and requiring the respondents to show cause at Special Term why said prohibition should not be made absolute, etc.

The alternative writ was granted upon affidavits in support of the allegations of the relator, and showing that the fund in the hands of the surrogate was insufficient to pay all the claims against the estate, including those of the relator. The respondents having made their return to the alternative writ, the application for a peremptory writ was heard at Special Term on the alternative writ and the return, and an order was made denying the application. That order was affirmed at General Term and the relator appeals to this court.

We do not deem it proper to pass now upon the claims to equitable relief set up by the relator and argued in the elaborate points which he has submitted, nor upon the question of the jurisdiction of the surrogate in the matter, for the reason that we are of opinion that the decision of the Supreme Court denying the writ of prohibition is not reviewable in this court. The writ of prohibition is an extraordinary remedy, and should

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be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, or by appeal, and it is not demandable as matter of right, but of sound judicial discretion, to be granted or withheld, according to the circumstances of each particular case. (*Kinloch v. Harvey*, Harp. [S. Car.] 508.) This question was considered at an early day by the English courts, and was at one time a subject of controversy. In the reign of Charles the 2d, case of the *Lord Admiral v. Linsted* (Siderfin, 178 [15 Car. 2]), it was said by the chief justice that prohibitions were discretionary; but this was denied by KEELING, J., and his view prevailed during the time of that reporter. In *Serjeant Morton's Case* (Sid. 65 [13 Car. 2]), it is stated to have been the opinion of the whole court that prohibitions were grantable as matter of right, and did not rest in discretion as was said in Hob. 67, 66 b; and in *Woodward v. Bonithan* (T. Raym. 2), in the same reign (12 Car. 2) it was agreed that the granting of the writ was not discretionary, but that such writs were grantable *ex debito justitiæ*. It is worthy of note that all those cases arose during the judicial strife which was carried on in the sixteenth and seventeenth centuries between the Courts of King's Bench and the Courts of Admiralty, and they are all cases involved in that contest, the severity of which is described in Benedict's Admiralty, chap. 6, § 74 *et seq.*, where it is said that matters raged so high that a war was declared between the two courts, and prohibitions were hurled from Westminster Hall without much order. In 1648 the Republican Parliament of England, at the instance of the friends of trade and commerce, took sides with the Admiralty and adopted the ordinance of 1648 (Scobell's Collection, p. 147, chap. 112), entitled "The Jurisdiction of the Court of Admiralty Settled." Under this ordinance the Admiralty was administered by Dr. Godolphin until the restoration, in the year 1660, when it ceased to be in force, and the war of prohibition was resumed by the common-law judges. It was at this period that the decisions to which I have referred, holding the writ of prohibition to be matter of right and not of discretion,

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were rendered by the King's Bench. But at a later day in 11 William the 3d, in the case of the *Bishop of St. David v. Lucy*, reported in 1 Ld. Raym. 539, a writ of prohibition was denied by the Court of King's Bench, and it appears by a note at page 545 that after this denial the bishop petitioned the lord chancellor for a writ of error upon this denial, and he, having some doubt, referred it to the attorney-general, who certified his opinion to be that a writ of error would lie. Thereupon the writ of error was granted, and the whole record brought by the chief justice (HOLT) into Parliament, and afterward, on hearing his opinion, the lords were of opinion that a writ of error would not lie in the case. This decision is also referred to in Salk. 136, and I find nothing later to the contrary.

In this State the principle of that decision has been adopted in the Supreme Court. *Ex parte Braudlacht* (2 Hill, 367), where COWEN, J., says: "We have a discretion to grant or deny the writ," referring to *State v. Hudnall* (2 Nott & McC. 419, 423), and the same view is expressed by elementary writers. (High on Extraordinary Remedies, § 765; 2 Crary's Spec. Proceedings, 87.)

It being discretionary with the Supreme Court whether to grant or deny the writ, its order refusing to grant it is not appealable to this court.

The appeal must be dismissed, with costs against the relator.

All concur, except MILLER and TRACY, JJ., absent.

Appeal dismissed.

GEORGE MALCOM, Respondent, v. HUGH O'REILLY et al., Appellants.

Plaintiff's complaint in an action for conversion of personal property, alleged in substance the execution and delivery to plaintiff by W., the then owner, of a chattel mortgage upon the property, a demand of payment, and that "thereupon, pursuant to said mortgage, plaintiff was entitled to the immediate possession and control of the property so mortgaged and became the owner thereof, and thereupon took the same into his possession," and

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while lawfully and quietly possessed thereof that defendant wrongfully took and converted the same. A copy of the mortgage was attached. By its terms, the debt secured by the mortgage was payable on demand. Defendants demurred, claiming that the complaint was defective in not averring that default had been made in the payment of the mortgage. *Held* untenable; that the allegations of ownership and lawful possession were sufficient without setting forth in detail how title was acquired; and also that a default was clearly to be implied from the facts stated.

(Submitted April 25, 1882; decided May 5, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 18, 1880, which affirmed a judgment in favor of plaintiff, entered upon an order overruling a demurrer to plaintiff's complaint. (Reported below, 14 J. & S. 222.)

This action was for the alleged conversion of a quantity of personal property.

The action was originally brought against the sheriff of the county of New York. Before the time to answer expired, the sheriff's indemnitors were, pursuant to the Code of Civil Procedure (§§ 1421-6, substituted. The complaint alleged in substance the execution and delivery to plaintiff of a chattel mortgage upon the property by Daniel Whelan, the then owner. A copy of the mortgage was attached to the complaint. By its terms the mortgage debt was payable on demand. The complaint then contained this allegation, "that previous and for a considerable length of time before the conversion of the goods hereinafter mentioned, the payment of the said sum of \$593 (five hundred and ninety-three dollars) was duly demanded by the plaintiff from the said Daniel Whelan, and thereupon, pursuant to said mortgage, the plaintiff was entitled to the immediate possession and control of the property so mortgaged, and became the owner thereof, and thereupon took the same into his possession, and while the plaintiff was lawfully, quietly and peaceably possessed of said property, the defendant, on or about the 20th day of September, 1878, wrongfully and unlawfully took, converted and disposed of the same to his use without any regard of a notice to him given that the plaintiff was the owner thereof."

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Defendants demurred on the ground that the complaint did not state facts constituting a cause of action.

William P. Mulry for appellants. In a pleading on the case or in any pleading all essential facts must be set forth with particularity. (*Goelet v. Asseler*, 22 N. Y. 228; *Allen v. Patterson*, 7 id. 478; *McKyring v. Bull*, 16 id. 297; *Emery v. Pease*, 20 id. 64.) When different meanings are presented those most unfavorable to the pleader must be adopted. (*Hoheimer v. Carroll*, 59 N. Y. 269-272; *Bunge v. Loop*, 48 id. 231; *Winter v. Baker*, 50 Barb. 432.) Liberal construction of pleadings applies to form not substance. (*Spear v. Downing*, 34 Barb. 522.) The mortgagee must allege in his complaint not only that he demanded payment of the amount, to secure which it is claimed the mortgage was given, but also that the mortgagor made default in the payment, for until such default the mortgagor, by the express terms of the mortgage, was entitled to the full custody and possession of the property covered by the mortgage. (*Goelet v. Asseler*, 22 N. Y. 225, 232-234; *Bragelman v. Dane*, 69 id. 74.) Both the possession and right of possession must concur before such an action can be maintained, and this must be alleged in the complaint. (*Goelet v. Asseler*, 22 N. Y. 234; *Gordon v. Harper*, 7 T. R. 8; *Hull v. Carnley*, 11 N. Y. 501; 17 id. 202; *Bailey v. Burnton*, 8 Wend. 339; *Manning v. Monaghan*, 23 N. Y. 539; *S. C.*, 28 id. 585; *Van Hassell v. Borden*, 1 Hilt. 128; *Smith v. Beattie*, 31 N. Y. 542; *Hathaway v. Brayman*, 42 id. 322; *Porter v. Parmley*, 52 id. 185; *West v. Crary*, 47 id. 423; *Partall v. Eggert*, 54 id. 18.) The statement that the mortgagee was lawfully possessed is untenable; being a conclusion of law not issuable, it should not have been pleaded. (*City of Buffalo v. Halloway*, 7 N. Y. 493, 498; *McKyring v. Bull*, 16 id. 297; *Fry v. Bennett*, 5 Sandf. 54; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Cook v. Warren*, 14 Week. Dig. 50.) Facts and not conclusions of law are admitted by a demurrer. (*Bonnell v. Griswold*, 68 N. Y. 294; *Jordan v. S. & L. Bank*, 74 id. 467-472; *People v. Comm'rs*

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of *Marlborough*, 54 id. 276.) Mere possession of another's property is not evidence of ownership. (*Jordan v. S. & L. Bank*, 74 N. Y. 467; *Ballard v. Burgett*, 40 id. 316; *Straight v. Harmley*, 39 id. 446.) There could be no forfeiture of the plaintiff's rights as mortgagee, as until default he had a constructive reversionary interest on which he could recover for damages to the property on that ground alone. (*Manning v. Monaghan*, 23 N. Y. 539; *S. C.*, 28 id. 585; *Goelet v. Asseler*, 22 id. 234.) He should have proved to what extent his security was impaired, by showing whether the debtor was responsible or not, and whether he can or can not follow and enforce his lien against the property. (*Hull v. Carnley*, 17 N. Y. 202; *Goelet v. Asseler*, 22 id. 228.) Until a chattel mortgage becomes a bill of absolute sale by nonperformance of condition, *i. e.*, payment, the mortgagor retains not only the possession, but has such a possessory right for a definite period, in the chattel mortgaged against the mortgagee, coupled with the right of redemption that it can be levied and sold upon execution. (*Hull v. Carnley*, 11 N. Y. 501; *S. C.*, 17 id. 202; *Hamill v. Gillespie*, 48 id. 556-559; *Hall v. Sampson*, 35 id. 274; *Hathaway v. Brayman*, 42 id. 322.) It being admitted that the proceedings had, substituting the parties defendant in the place of the sheriff, were regular, and any irregularity or defect having been waived, the respondent is estopped from denying the right of the substituted defendants to demur to the complaint, no other complaint having been served upon them. (Code of Civil Procedure, § 1426; Code of Procedure, § 726; *Moore v. Hamilton*, 44 N. Y. 666, 72-73.) The chattel mortgage is only a statement of a conditional sale by which the mortgagee does not become vested with all the indicia or rights of ownership until default. (*Conover v. Cunningham*, 77 N. Y. 398; *Ballard v. Burgess*, 40 id. 314.)

J. F. Bullwinkel for respondent. The substitution of persons as defendants in an action does not change or affect the merits. The same cause of action continues, subject to all the incidents as they existed against the original parties. (Code of Procedure,

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§§ 1426, 756; *Wright v. Storms*, 3 Code R. 138; *Van Sycklen v. Perry*, 3 Rob. 621; *Peck v. Ward*, 3 Duer, 647; *Thwing v. Thwing*, 9 Abb. 323; *Moore v. Hamilton*, 44 N. Y. 666.) An action as set out in the complaint lies against the sheriff at the instance of a mortgagee of personal property if at the time the conversion occurred he had the possession or the right thereto. (1 Chitty's Pleadings, 167, 189; *Hull v. Carnley*, 1 Kern. 509.) An action of trover will lie against a sheriff at the instance of a mortgagee of chattels, if at the time of the conversion the mortgagee was possessed or had the right to the possession of the goods converted. (*Goelet v. Asseler*, 22 N. Y. 225; *Hull v. Carnley*, 17 id. 202; *Chadwick v. Lamb*, 29 Barb. 518.) Proof of demand is not necessary when the action of conversion is brought against the wrongdoer, but it cannot be dispensed with when the action is against the parties to the mortgage. (*Brown v. Cook*, 3 E. D. Smith, 123.) In an action of this nature if the mortgagee is in possession of the property at the time it was taken, and no demand had been made for the payment of the money mentioned in the mortgage, he may nevertheless maintain his action for conversion. (*Chadwick v. Lamb*, 29 Barb. 518; *Mattison v. Baucus*, 1 Comst. 295.)

RAPALLO, J. The plaintiff's mortgage upon the chattels in controversy was payable on demand. The complaint alleges that before the conversion of the chattels by the defendants the plaintiff demanded of the mortgagor payment of the mortgage debt, and thereupon became entitled to the immediate possession of the property, and became the owner thereof and took the same into his possession, and while he was so lawfully in possession thereof, the defendant wrongfully took it and converted it to his own use without regard to a notice given to him that plaintiff was the owner.

These allegations show that the mortgage debt had become due, but the defendants contend, in support of their demurrer, that the complaint is defective in not averring that default had been made in the payment thereof. Though the default is not

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alleged in terms, we think enough was stated to entitle the plaintiff to maintain the action. He alleges that, at the time of the conversion by the defendant, he, the plaintiff, was owner of the property and lawfully in possession thereof. These allegations would have been sufficient without setting forth in detail how he acquired the title and possession, and though in attempting to do so he omitted to state, in terms, the default in complying with his demand of payment, yet such default is consistent with and clearly to be implied from the facts stated, and the omission to mention it does not vitiate the general averment of title and possession. The substance of the complaint is that he became owner under a mortgage which was past due, and under which he had taken possession and was lawfully in possession.

The judgment should be affirmed.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

CHARLES WAGER et al., Appellants, v. ELIZA H. WAGER et al.,
Respondents.

The jurisdiction of equity over trusts, gives it authority to construe wills, whenever necessary to guide the action of a trustee.

An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity, although no express trust be created by the will.

Any person claiming an interest in the personalty, either as legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to.

It seems, that where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors.

An heir at law or devisee, who claims a mere legal estate in real property,

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| 89 | 161 |
| 108 | 267 |
| 89 | 161 |
| 112 | 116 |
| 89 | 161 |
| 125 | 566 |
| 89 | 161 |
| 126 | 200 |
| 127 | 543 |
| 89 | 161 |
| 139 | 218 |

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when there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. Where, however, the court has obtained jurisdiction for the purpose of establishing the equitable rights of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy.

Chipman v. Montgomery (63 N. Y. 221), distinguished.

Wager v. Wager (21 Hun, 93), reversed.

(Submitted December 14, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made May 17, 1880, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 21 Hun, 93.)

This action was brought to obtain a judicial construction of the will of William Wager, deceased.

The material facts are stated in the opinion.

J. & Q. Van Voorhis for appellants. The court below erred in holding that it had not jurisdiction to adjudge the construction of the will. (*De Bussiere v. Hallady*, 55 How. 210; *Bower v. Smith*, 10 Paige, 99; Willard's Equity Jur. 490; 3 Redf. 484; Dayton on Surr. 213; 2 P. Wms. 550, note 1; *Bailey v. Briggs*, 59 N. Y. 407; 1 Perry on Trusts, § 94; *Kiah v. Grenier*, 1 N. Y. Sup. Ct. 390; *Walrath v. Handy*, 24 How. 353; *Onderdonk v. Mott*, 34 Barb. 113; *Smith v. Van Ostrand*, 64 N. Y. 278; *Moke v. Narrie*, 15 Hun, 128; *Chipman v. Montgomery*, 63 N. Y. 221; *Wright v. Wright*, 54 id. 443; *Jones v. Butler*, 20 How. 189; *Emery v. Pease*, 20 N. Y. 62.) The General Term erred in holding that the Surrogate's Court has ample jurisdiction in the premises. (Code of Civil Procedure, § 2624; *Bevan v. Cooper*, 72 N. Y. 327; *Tucker v. Tucker*, 4 Keyes, 136.) This action prevents litigation, and upon that ground the Supreme Court had jurisdiction and ought to have exercised it. (*Burhans v. Burhans*, 2 Barb. Ch. 398; *O'Dougherty v. Aldrich*, 5 Den. 388; *Jenkins v. Van Schaick*, 3 Paige, 242; *Therasson v. White*, 52 How. 63; *Clapp v. Bromaghem*, 9 Cow. 530; 1 Pomeroy on Eq.

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Jur. 293, § 269; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 151, 156; *Ireland v. City of Rochester*, 51 Barb. 415; *Kennedy v. City of Troy*, 14 Hun, 308, 312; *Clark v. Village of Dunkirk*, 12 Hun, 181, 187; *Scofield v. City of Lansing*, 17 Mich. 437; *City of Lafayette v. Fowler*, 34 Ind. 140; *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y. 592.) This action can be maintained on the ground that the respondent is misappropriating and wasting the \$4,000 in her hands as a special trust. (*Chipman v. Montgomery*, 63 N. Y. 221; *Marlett v. Marlett*, 14 Hun, 313.) This action may be maintained under chapter 238, Laws of 1853. (*De Bussiere v. Holladay*, 55 How. 220; *Knox v. Jones*, 47 N. Y. 389; *Isham v. Gibbons*, 1 Bradf. 79.) By going to trial the respondent submitted to the jurisdiction of the court, and it was error for the court to hold afterward when it came to pass upon the case, that there was no jurisdiction. (*De Bussiere v. Holladay*, 55 How. 210; *Pam v. Vilmar*, id. 235; *Green v. Milbank*, 3 Abb. N. C. 138.) The will gave to Susan Wager the absolute title to the rest, residue and remainder of the testator's estate. The gift over is repugnant to such absolute ownership and is, therefore, void. (*Trustees of Theological Seminary of Auburn v. Kellog*, 16 N. Y. 93; *Smith v. Van Ostrand*, 64 id. 284-5; *Jackson v. Bull*, 10 Johns. 19; *Hill v. Hill*, 4 Barb. 419; *Patterson v. Ellis*, 11 Wend. 260; *Ide v. Ide*, 5 Mass. 500; *Jackson, ex dem. Livingston, v. Robins*, 16 Johns. 537; *Ferris v. Gibson*, 4 Edw. Ch. 710; 8 Viner's Abr. 103; *Flanders v. Clark*, 1 Ves. Sr. 9; *Butterfield v. Butterfield*, id. 133; *Noris v. Beyea*, 3 Kern. 286; *Converse v. Kellogg*, 7 Barb. 593; *Kelly v. Kelly*, 61 N. Y. 50; Redfield on Wills [ed. 1864], 431.) The testator not having in his will made any provision against a lapse of the legacy or devise to the daughter in case of her death in his life-time, the same has lapsed. (Redfield on Wills, Part 2 [ed. of 1866], 491; *Sibley v. Cook*, 3 Atk. 572; *Corbyn v. French*, 4 Ves. 418, 435; *Baker v. Hansberry*, 3 Russ. 340; Roper on Legacies, 471; Williams on Executors, 1207 [1304]; Willard on Executors, 354; Jarman on Wills [ed. of 1861], 766; [Rule of Construction, No. 24]; *Perkins v. Michelwaite*,

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1 P. Wms. 274; *Areson v. Areson*, 3 Den. 458, 461, 462, 463; *Scott v. Guernsey*, 48 N. Y. 106.)

E. A. Nash for respondent. There is no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate, and a subsequent provision that upon a contingent event the estate should be diverted and go over to another person. (*Norris v. Beyea*, 13 N. Y. 284; *Taggart v. Murray*, 53 id. 236; *Terry v. Wiggins*, 47 id. 512; *Smith v. Bell*, 6 Peters, 68; *Colt v. Heard*, 10 Hun, 189; *Campbell v. Beaumont*, 12 Weekly Dig. 232; 2 Redf. on Wills [3d ed.], 395; 1 Jarman, on Wills [Bigelow's ed.], 472, note 1.) The devise and bequest to the daughter lapsed by her death in the life-time of the testator, and the remainder over to the wife took effect. (2 Redf. on Wills, 278, pl. 34; *Burbank v. Whitney*, 24 Pick. 146; *Mowatt v. Carow*, 7 Paige, 328; *Downing v. Marshall*, 23 N. Y. 366; *McLean v. Freeman*, 70 id. 81; *Norris v. Beyea*, 13 id. 284.)

RAPALLO, J. The plaintiffs are next of kin and heirs at law of William Wager, deceased, and claim to be entitled to share in his residuary estate which, as they allege, is undisposed of by his will. The defendant, Eliza H. Wager, is the widow and executrix of the testator, and has taken possession of all the property and estate which he had at the time of his death, and claims to hold and own the same in her own right, to the exclusion of the plaintiff and other heirs and next of kin, and claims that by said will the whole of said property and estate belongs to her as devisee and legatee, absolutely.

By the first clause of the will the testator bequeaths to his wife \$4,000, "to have the use and control of the said sum of \$4,000 during the term of her natural life, and in case the interest of the said \$4,000 shall not be sufficient to support and maintain her, then she is to have the privilege and the right to use so much, from time to time, of the principal of the said \$4,000 as she shall deem sufficient to support and make her comfortable," and said bequest is to be in lieu of dower.

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By the second clause the testator devises and bequeaths to his daughter Susie E. Wager all the remainder of his real and personal estate, and also whatever amount shall remain or be left by his said wife, at her death, of the said sum of \$4,000.

Then follows the provision upon which the present controversy arises, which is in the following words: "But in case my daughter, Susie E. Wager, shall die leaving no issue, before the death of my wife, then in that case all the property, both real and personal, *that shall be left by my daughter at her death which shall belong to me at my death*, I give, together with what shall remain from the above-mentioned \$4,000, devise and bequeath to my beloved wife Eliza H. Wager, to her use, her heirs and assigns forever."

The testator's daughter Susie died three days before the testator, and the plaintiffs contend that the residuary bequest to her, lapsed by her death, and that the bequest in remainder to the widow did not take effect, such bequest being of all the property, etc., "that shall be left by my daughter at her death which shall belong to me at my death." That consequently the testator died intestate as to all but the \$4,000 given to his widow, and the residue descended to his heirs and next of kin. The widow, on the other hand, claims that the terms of the bequest of the residue are sufficient to entitle her to take.

The testator left real estate of the value of about \$2,000, and personal estate to the amount of about \$10,000. All his heirs and next of kin are parties to the action, and the plaintiffs ask judgment construing the will, and that it be determined whether, under the provisions thereof, the widow is entitled to all the estate of the testator, or whether all but the \$4,000 should be distributed according to law, and for such other or further relief or judgment as may be proper.

If the court should sustain the construction claimed by the plaintiffs, it could undoubtedly, under this complaint, require the executrix to account for the personal estate in this action or remit the parties to the ordinary proceedings in the proper Surrogate's Court for an accounting.

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The complaint was dismissed in the court below on the sole ground, as stated in the conclusion of law of the trial judge, that the court had not jurisdiction to declare and adjudge the construction of the will of said William Wager, deceased, in this action.

This conclusion cannot, in our judgment, be sustained. The defendant, Eliza H. Wager, has possession of all the personal estate left by the testator, and has the legal title thereto in her capacity as executrix. The object of this action is to fasten upon a portion of that property a trust in favor of the plaintiffs, and other next of kin, which trust is denied by the executrix, who claims absolutely and in her own right, the equitable as well as the legal title to the property. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to control or guide the action of a trustee, and there can be no clearer case for the exercise of that jurisdiction than where the trustee denies the existence of the trust, and claims the right to appropriate the trust property to his own use. An executor is always a trustee of the personal property of the testator and can be called upon to account therefor as such in a court of equity, even though no express trust be created by the will.

So far as the property is effectually disposed of by the will, the executor holds it in trust for the legatees or beneficiaries, and, according to the law of this country, if there is any part of such property or any interest therein not effectually disposed of by the will, he holds it in trust for those who are entitled to it under the statute of distributions. (*Bowers v. Smith*, 10 Paige, 193; 1 Williams on Executors, 294; 2 Story's Eq. Jur., § 1208; *Hays v. Jackson*, 6 Mass. 153.)

Any person claiming an interest in the personal estate of the testator, either as legatee under the will, or as entitled to it under the statute of distributions, may file a bill against the executors to settle the construction and ascertain the validity of the provisions of the will, so far as the complainant's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or

equitably entitled to. (*Bowers v. Smith*, 10 Paige, 200.) As all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform his testamentary trusts with propriety. Hence, although in those courts, as well as in courts of law, the seal of the court of probate is conclusive evidence of the *factum* of a will, an equitable jurisdiction has arisen of construing the will in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction in contradistinction to the courts of probate. (1 Williams on Ex. 294; *Hayes v. Hayes*, 48 N. H. 219; Redfield on Wills, 495.)

There is no more common instance of the interposition of the Court of Chancery in England to construe wills of personal estate and declare an executor to hold as trustee, than the very case now before us; that is, where an executor claims to take the residuary estate in his own right, in hostility to the claims of the next of kin. By the English law executors take beneficially as well as nominally, all the personal estate not effectually disposed of by the will, where there is nothing in the will to the contrary, but courts of equity lay hold of any circumstances which may rebut the presumption of such a gift to the executor, and the books are full of cases where equity has interposed to construe the will in this respect, many of which cases are very analogous to the present one. In *Bishop of Cloyne v. Young* (2 Ves. Sr. 91), the testator, after making various legacies, gave and bequeathed the remainder of his estate, real and personal, without saying to whom. The executors claimed it and the next of kin filed a bill to have them declared trustees of the residue for their benefit, and it was so decreed by Lord HARDWICKE. In *Lord North v. Purdon* (2 Ves. Sr. 495), the testatrix gave all her property to M. L., to be paid to her at twenty-one or marriage, whichever should first happen, or in case she died before twenty-one or marriage, then to blank, and appointed the defendants executors. She died before twenty-one, unmarried, and the plaintiffs as next of kin of the testatrix claimed that a trust should be declared in their favor, and it was so de-

creed, the master of the rolls construing the will both as to the vesting of the legacy and the intention that the executors should not take. *Nicholls v. Crisp* (Ambler, 769), was a case like the present one. The bequest of the residuary estate lapsed by the death of the residuary legatee in the life-time of the testator, and the question was presented by the next of kin to the Court of Chancery, who decided in favor of the next of kin. *Bennet v. Batchelor* (3 Bro. Ch.), was a similar case of a lapsed legacy, and the executors on a bill filed against them by the next of kin were decreed to hold as trustees. *Hornsby v. Finch* (2 Ves. Ch. 78), was also a bill filed by next of kin against executors where the residue was unbequeathed. There was a specific legacy to the executor, and the court construed the will as evincing an intention that the executor should not have the residue, and decreed him trustee for the next of kin.

There can be no doubt of the jurisdiction of a court of equity to entertain such an action. Where complete relief can be obtained in the Surrogate's Court, a court of equity may, in its discretion, decline, on that ground, to entertain an action for an accounting or other relief against executors, but the proposition that the court has no jurisdiction in such a case cannot be sustained. The rule is different in respect to real estate. An heir at law or devisee who claims a mere legal estate in real property, where there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will and thus determining the title to the real estate; for the decision of such legal questions belongs exclusively to courts of law, unless a court of equity has obtained jurisdiction of the case for some other purpose. (*Bowers v. Smith*, 10 Paige, 193; *Post v. Hover*, 33 N. Y. 602.) If the court has obtained jurisdiction for the purpose of establishing the equitable right of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy. (10 Paige, 200.)

The case of *Chipman v. Montgomery* (63 N. Y. 221) was decided on different grounds. The plaintiffs there had, on their own showing, no present interest in the property, and might

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never have any. There were many other reasons for dismissing the complaint in that action, and the case was entirely different from the present one.

As the court below declined to entertain the case, and has given no construction to the will, there is no actual determination of the General Term on that subject to be reviewed. For this reason we do not consider that branch of the case properly before us at the present time, but leave it to be considered in the first instance by the Supreme Court.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except MILLER, J., absent.
Judgment reversed.

HATTIE R. LENT et al., Respondents, v. HAYDEN H. HOWARD et al., Executors, etc., Appellants.

Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title and the heirs are entitled at law to the intermediate rents and profits.

If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund ; the heir may be compelled to account therefor to the executor, and the latter to the beneficiary, for so much thereof as is received by him, as well as for the proceeds of sales.

Where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion, and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale.

The will of L., after giving various legacies, contained a clause authorizing his executors to sell all of his real estate, except his homestead farm, at such times and prices as to them should seem best for the interest of the estate, and after carrying out the foregoing provisions to invest the balance of the estate in their hands in bonds and mortgages or in State

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stocks. One-half of such balance the testator gave to his daughter L., to be paid to her when she arrived of age; in case of her death, before the testator's wife, without lawful issue, the same to be paid to the wife. The other half he gave to his wife to be paid to her ten years after his decease. In case of her death before the daughter, said one-half to be paid to the daughter. The homestead farm was devised to the wife for life. The executors received the rents and profits of the real estate. In an action for an accounting, *held*, that by said clause there was a conversion of the testator's real estate, with the exception specified, into personalty, as of the time of his death, and a gift of the converted fund together with the intermediate income to the wife and daughter with cross-remainders; and that the rents and profits received by the executors, and the proceeds of sales were properly brought into the accounting.

The testator left five farms, including the homestead farm, and several houses and lots in the village of L. R. B., one of the executors, who lived several miles from L.-R., at the request of the other executors, including the widow, removed to that village, took charge of all the real estate and continued in charge thereof, except two farms sold, working upon, managing and improving it for nearly fifteen years. The gross rents and profits were entered in the executors' accounts, and also the disbursements. The will gave to the executors \$1,000 in addition to their commissions. The referee found that the services of B. exceeded in value his commissions and the sum so given. *Held*, that B. was entitled to be allowed out of said gross rents and profits, in the nature of a charge thereon, a suitable compensation for his services; that the rule prohibiting an executor from charging more than the statutory commissions for his personal services in the discharge of the duties of his trust did not apply, as the services so rendered were no part of his executorial duties.

It seems that it is the duty of trustees holding funds for investment to use due diligence to keep them invested; if they have retained them uninvested beyond a reasonable time, six months being usually allowed, they are *prima facie* liable for interest, and the burden is upon them, upon an accounting, to explain or justify the delay.

B. received a sum of money on the exchange of a house and lot for a farm. *Held*, that in the absence of evidence that the exchange was made with the knowledge of his co-executor, H., or that the money ever came to the hands or under the control of the latter, he was not chargeable with the sum so received.

The executors were directed by the will to set apart the sum of \$10,000 on bond and mortgage, the income to be expended for the maintenance of the daughter during life; it also gave to the widow an annuity of \$700, the executors being directed to invest sufficient to produce it. The executors had not, at the time of the trial, made any investments, and had, before that time, transferred to the plaintiffs, who were the widow and daughter, the latter then being of age, and who were the only persons

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interested, all the real and personal estate of the testator in their hands. Plaintiffs asked that the trusts be extinguished. *Held*, that the court had no authority to permit the alienation or abrogation of such a trust.

(Argued April 5, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Tuesday of June, 1881, which affirmed a judgment entered upon the report of a referee.

This action was brought by plaintiffs, the widow and only child of John H. Lent, late of Le Roy, Genesee county, who died June 20, 1863, against defendants as executors and trustees under the will of said deceased, for an accounting, and for an extinguishment of the unexecuted trusts under the will and transfer to plaintiffs of the residue of the estate.

The material portions of the will are as follows :

“ *Item third.* * * * And I also give, devise, and bequeath unto my said wife, Hattie R. Lent, the use, occupation and enjoyment of my homestead farm and premises, containing about two hundred acres of land situate on the north side of Main street, in Le Roy, for and during her natural life, free of rent, and at the decease of my said wife, I give, bequeath and devise my said homestead farm to my said daughter, Lucy M., her heirs and assigns forever, in fee; and in case my said daughter, Lucy M., should die before my said wife, without leaving lawful issue, then I give and devise my said homestead farm to my said wife absolutely in fee, her heirs and assigns forever.”

“ *Item fifth.* I hereby will and direct my said executors to set apart and invest the further sum of ten thousand dollars (\$10,000) out of my personal property or estate, on bond and mortgage on unincumbered real estate, worth double that amount on semi-annual interest, the interest on such sum, or so much thereof as may be necessary, I direct to be expended annually by my said executors for the support, maintenance and education of my said daughter, Lucy M., during her minority, and in case the interest or income of said sum shall be

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more than sufficient for the purpose above expressed, then I direct that the surplus thereof shall be added to and become part of the principal sum so to be invested as aforesaid ; and I further direct that on and after my said daughter, Lucy M., shall attain the age of twenty-one years, the said sum shall continue to be invested by my said executors, or the survivor of them, as above directed, and the interest thereon to be paid to her semi-annually during her natural life ; and in case my said daughter shall die before my said wife, without leaving lawful issue, then I direct that the said principal sum above set apart for her use and benefit shall be paid to my said wife, to have, hold and use the same, and to her heirs and assigns forever.

“ *Item sixth.* I give and bequeath to my said wife, Hattie R., an annuity of seven hundred dollars, to be paid to her semi-annually during her natural life, and direct my said executors to set apart and invest out of my personal estate a sum sufficient to produce such annuity, to be invested on bond and mortgage on unincumbered real estate at least double the amount, and if my said daughter survives my said wife, then my said daughter, Lucy M., is to inherit this annuity absolutely, and in that case I give and bequeath such annuity unto my said daughter, to be paid and invested as above directed.”

“ *Item eighth.* I give to my executors, each, the sum of one thousand dollars, over and above fees for executing this my will.

“ *Item ninth.* I hereby authorize and empower my said executors, or the survivor of them, to sell all of my real estate and convert the same into money (except my said homestead farm), at such time or times, and at such prices as shall to them seem best for the interest of my estate, and to carry out any and all contracts executed by me ; and I further direct my said executors, after paying debts and carrying out the provisions of my will as above directed, to invest all the balance and remainder of my estate remaining in their hands on bond and mortgage on unincumbered real estate, worth double the amount, on semi-annual interest, or in State stocks of New York, or both, as to them shall seem best for the interest of my estate.

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“ The one equal half of such balance or remainder I give and bequeath to my said daughter, Lucy M., to be paid to her on her attaining twenty-one years of age, and to her heirs and assigns forever, except in case she shall die before my said wife without leaving lawful issue, then such balance or remainder to be paid to my said wife absolutely. The other one-half of such balance or remainder I give and bequeath to my said wife, Hattie, to be paid to her at the expiration of ten years after my decease, her heirs and assigns. In case she dies before my said daughter, then the said one-half last above mentioned to be paid to my said daughter absolutely.

“ The above provisions and bequests to my said wife to be in lieu of her dower out of my estate.

“ Hereby revoking all former wills or codicils by me made.

“ And I hereby constitute and appoint my wife, Hattie R. Lent, E. Nelson Bailey and Hayden U. Howard, executrix and executors and trustees of this my last will and testament.

“ And I do appoint my said wife guardian of my said daughter, and in case of her decease before the majority of my said daughter, then I appoint Hayden U. Howard her guardian.”

At his death the testator was the owner of a large personal estate and of real estate consisting of five improved farms, houses and other tenements in Le Roy, and some wild land in Michigan.

Immediately after the death of the testator and before the will was proved, the two executors, Howard and Bailey, arranged between themselves as to the management of the estate. Mr. Bailey was to take the management and direct control of the real estate, and Mr. Howard was to take the immediate control and management of the moneys, credits and securities; each, however, subsequently acted and participated with the other in the affairs of each department of the estate. This arrangement was communicated to Mrs. Lent, and she acquiesced in it. When the will had been proved, Mr. Howard took possession of the entire personal estate, except the farm and stock and chattels which were left in the custody and control of Mr. Bailey, and the property specifically bequeathed to

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Mrs. Lent which was delivered to her; and Mr. Bailey assumed the control and management of the real estate, including the homestead farm, and continued in charge working the farms and receiving the rents and profits until March, 1878. An inventory was made but never filed; no funds were set apart or invested as required by items five and six of the will. Two of the farms were sold; upon the accountings the executors were charged with the proceeds and for the rents and profits of the real estate.

The further material facts appear in the opinion.

William F. Cogswell for appellants. The defendants, as executors of the will of Mr. Lent, had not, and it was legally impossible that they should have, any interest in or control of the real estate which he left, except merely the power of sale. Until the time such power was exercised, the real estate descended to the heir at law of Mr. Lent, subject to the execution of the power. (*Downing v. Marshall*, 22 N. Y. 366, 380; *White v. Howard*, 46 id. 144; *Hetzel v. Barber*, 69 id. 1; *Crittenden v. Fairchild*, 41 id. 289.) The referee erred in charging the defendants with interest upon money in their hands at the end of each year. (*Hartwell v. Root*, 19 Johns. 345; *Perry on Trusts*, § 890; *Taylor v. Benham*, 8 How. [U. S.] 233, 275.) He also erred in charging each executor not only for all the moneys received by himself, but also for all the moneys received by his co-executor. (*Redfield on Law and Practice of Surrogate's Court* [2d ed.], 507, notes 1 and 2.) Mrs. Lent, as testamentary guardian of her daughter had power to employ a proper person to take charge of the real estate. (2 R. S. 153, § 20.) The services rendered by Bailey were entirely outside of his duty as executor, and he had a right to compensation therefor. (*Lansing v. Lansing*, 45 Barb. 182; *Morgan v. Morgan*, 39 id. 20.)

George Bowen for appellants. In general when a person is bound to do an act the omission of which would be a culpable neglect of duty the performance of it will be presumed. (*Hart-*

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well v. Root, 19 Johns. 345; Perry on Trusts [last ed.], § 890.) The executors can only be made responsible for a sum greater than they have received in cases of very supine negligence or willful default. (*Taylor v. Benham*, 5 How. [U. S.] 233, 275.) A breach of trust is never presumed. (Perry on Trusts, §§ 353, 511, 580, citing 4 Johns. Ch. 45.) The trusts created by the will are not extinguished, and the trust property has not vested absolutely in the plaintiffs. (Perry on Trusts [last ed.], §§ 853, 849; *Wilson v. Troup*, 2 Cow. 195; *Beeson v. Beeson*, 9 Barr. 279.) The ninth clause of the will gave a mere naked power of sale. (*Hetzel v. Barber*, 69 N. Y. 1; reversing *S. C.*, 6 Hun, 5, 34; *Reed v. Underhill*, 12 Barb. 113; *Crittenden v. Fairchild*, 41 N. Y. 289.) A donee of a power to sell takes no estate in the land. (*White v. Howard*, 46 N. Y. 144; affirming 52 Barb. 294; *White v. Fox*, 63 Barb. 157; affirmed, 52 N. Y. 530-537; *Newell v. Nichols*, 75 id. 78-86; *Gourley v. Campbell*, 66 id. 169; reversing *S. C.*, 6 Hun, 218, and overruling 1 id. 38.) The party entitled to the land may elect to take it. (*Prentice v. Janssen*, 79 N. Y. 478.) A naked power to sell real estate may be exercised or not by an executor, and is discretionary. (*Taylor v. Benham*, 5 How. 233.) A testamentary guardian has a vested interest in the estate of his ward. He may bring actions relative thereto, make avowry in his own name, and make leases during the minority of the infant. (*People v. Byron*, 3 Johns. Cas. 53-56; R. S. [5th ed.] 243, §§ 1, 2; *Haggarty v. Haggarty*, 9 Hun, 175.) Until the farms could be sold it was the duty of the executors and trustees (and of Mrs. Lent with the rest) to have them worked, and to keep them in repair, and in a saleable condition. (*Lansing v. Lansing*, 45 Barb. 182; *Collier v. Munn*, 41 N. Y. 143; *In re Schell*, 53 id. 263, 266.) The services of Bailey are an equitable set-off on this accounting. (*Morton v. Ludlow*, 5 Paige, 519; *Davis v. Stover*, 58 N. Y. 473; *Smith v. Fox*, 48 id. 674; *Smith v. Felton*, 43 id. 419.) Technical objections, which would be valid at law, will not avail to defeat an equitable set-off. (43 N. Y. 419; *Lindsey v. Jackson*, 2 Paige, ; *Schermerhorn v. Anderson*, 2 Barb.

Opinion of the Court, per ANDREWS, Ch. J.

584; *Pignolet v. Geer*, 1 Robt. 626; *Briggs v. Briggs*, 20 Barb. 477; *Newell v. Salmon*, 22 id. 647; *Dobson v. Pearce*, 12 N. Y. 156-165.) If the creditor by means of a lien or other lawful means can pay himself without resorting to an action against the person of the debtor he may lawfully do so. (*Courtenay v. Williams*, 25 Eng. Ch. [3 Hare] 539, 551, 552; *Spears v. Hartley*, 3 Esp. 81.)

M. H. Peck for respondents. Defendants' answer did not set forth a counter-claim requiring a reply, and was not therefore admitted for want of a reply. (*Cook v. Jenkins*, 79 N. Y. 575; *Bates v. Rosekrans*, 37 id. 409; *Eq. Ins. Co. v. Cuyler*, 75 id. 511; *Von Sachs v. Kretz*, 72 id. 548.) Upon the facts found defendants were properly charged with interest upon the moneys remaining from year to year uninvested in their hands. (*King v. Talbott*, 40 N. Y. 76.)

ANDREWS, Ch. J. We are of opinion, that the executors were properly held to account for the rents and profits of the real estate received by them, and for the proceeds of sales of real estate made under the power conferred by the will.

It is undoubtedly true, that the executors did not take a legal estate in the lands of the testator. They were vested simply with a power of sale, and there being no specific devise of the lands, the title descended to the heirs of the testator, subject to the execution of the power (1 R. S. 722, § 56), and the right of possession followed the legal title. But while at law the rents and profits of land are incident to the possessory right and belong to the holder of the legal title, they may in equity belong to another. Where by a will a bare power of sale is given to executors, and the lands meanwhile descend to the heir, the latter is at law entitled to the intermediate rents and profits, but if the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then in equity the intermediate rents and profits, go with, and are deemed to be a part of the converted fund, and the heir may be compelled to account therefor to the executor. (*Stagg v. Jackson*, 1 N. Y. 206; *Moncrief v. Ross*, 50

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id. 431; *Lancaster v. Thornton*, 2 Burr. 1028; *Yates v. Compton*, 2 P. Wms. 308; Ram on Assets, 83.) In *Moncrief v. Ross* the action was by the heir against the executor to compel the latter to account for intermediate rents of real estate descended to the heir, subject to an immediate and imperative power of sale in the executor, and the relief was denied on the ground that the rents were assets in the hands of the executor. It appeared in that case that the executor had received the rents of the real estate, but under what circumstances the case does not disclose. The remedy of an executor to recover the intermediate rents and profits of land descended to the heir subject to an immediate and imperative power of sale and a gift of the proceeds to other persons, would seem to be in equity only. The legal possession of the land is in the heir, and not in the executor, and the latter cannot at law, recover possession, or exclude the heir therefrom. The heir may be compelled to account, and other equitable remedies may doubtless be resorted to by the executor to prevent spoliation, in the nature of waste, to the injury of the legatees of the proceeds.

We think there was by the ninth section of the will in question, a conversion of the testator's real estate (except the homestead farm,) into personalty as of the time of his death, and a gift of the converted fund, together with the intermediate income, to the testator's wife and daughter, with cross remainders. It is true that the power of sale is not in terms imperative. The words are those conferring authority, and not words of command or absolute direction. But it is clear that a conversion was necessary to accomplish the purpose and intention of the testator in the disposition of the proceeds, and when the general scheme of the will requires a conversion, the power of sale operates as a conversion, although not in terms imperative. (*Dodge v. Pond*, 23 N. Y. 69.) The conversion also will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale. (*Stagg v. Jackson*, *supra*; *Robinson v. Robinson*, 19 Beav. 494.) We are therefore of opinion, that the rents and profits of the real estate received by the executors,

and the proceeds of sales, were properly brought into the accounting.

But a serious question arises, which is not free from difficulty, in respect to the claim of the defendant, Bailey, to an allowance for services in taking charge of, and managing the farms and real estate of the testator, after his death. The testator left five farms (including his homestead farm), all but one of which, were in the county of Genesee, and, also several houses and lots in the village of Le Roy, in that county. The defendant Bailey, was the brother of the testator's wife, and the defendant Howard, her brother-in-law. Howard was a banker living at Batavia; and Bailey was a farmer and miller, living several miles from Le Roy. After the testator's death, he changed his residence, removed to Le Roy, and took charge of all the real estate belonging to the testator at the time of his death, including the homestead farm, which was devised to the testator's wife for life. He continued in charge of the real estate (except two farms, sold,) working upon, managing and improving it, and receiving the rents and income until March, 1878, a period of nearly fifteen years, and the services performed by him, as the referee found, exceeded in value his commissions as executor, and the legacy of one thousand dollars given him by the will. The defendant Bailey, took charge of the real estate at the request of the other executors, including Mrs. Lent, and the homestead farm was managed by him in the same way as the other real estate. It is clear that the executors supposed that the management and control of the real estate devolved upon them as such. The gross rents and income were entered in the executor's accounts, as were also the disbursements for taxes, repairs, labor, seed, etc. The general rule is well settled, that the commissions allowed by statute to executors measure the compensation to which they are entitled for their services in the execution of the trust. An executor, or trustee, empowered to manage an estate, may employ a clerk or agent, and charge the estate with the expense, when from the peculiar nature and situation of the property, the services of a clerk or agent are necessary, and

he will be allowed expenses of keeping up the estate, and for taxes, repairs, etc. But executors cannot employ one of their number as clerk and allow him a salary, nor will an executor be allowed compensation for his own services as attorney in the affairs of the estate. (*Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Clinch v. Eckford*, 8 id. 412; *Collier v. Munn*, 41 N. Y. 143; Perry on Trusts, § 913.) The principle is, that for the personal services of an executor or trustee in the discharge of executorial duties, or those which pertain to his trust, the commissions allowed by law are deemed to be a full equivalent. We are not disposed to impair the force of this salutary rule, although in some cases the statutory compensation may be quite inadequate. But we think the rule does not fully or justly apply to the claim of the defendant Bailey, to be allowed out of the gross rents and profits of the real estate a suitable compensation for his services in the nature of a charge thereon, for his labor expended in producing them. It was no part of his executorial duty to spend his time and labor in conducting the business of carrying on the farms. Clearly, there can be no ground for claiming that he owed any duty whatever in respect to the homestead farm; but as has been said, this farm was managed in the same way as the rest. The executors were not entitled to the possession of the testator's real estate. The control and management was apparently surrendered to Bailey by the consent of all the parties in interest. In accounting, the executors should be charged with the net income and profits, and we think a reasonable compensation to Bailey for his services and labor is a proper element to be considered in ascertaining them. This conclusion renders a reversal of the judgment necessary.

There is another important question in respect to the interest charged against the executors on uninvested balances in their hands from time to time. The referee charged them with interest on such balances, at the rate of six per cent, per annum, amounting in the aggregate to about \$20,000. The account rendered seems to show that the estate earned an average of more than five and one-half per cent, per year, from the

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death of the testator, up to the time of the accounting. There is no affirmative evidence that the executors negligently kept the fund uninvested, and there is some evidence that they made efforts to keep it at interest. They were directed by the will to invest the funds of the estate, on bond and mortgage, or in State stocks, of the State of New York. It is the duty of trustees, guardians, etc., holding funds for investment, to use due diligence to keep them invested. (*DePeyster v. Clarkson*, 2 Wend. 77.) Some time usually elapses before investments can be made, and in charging a trustee with interest, six months from the time the money was received, is usually allowed as a reasonable time. (*Dunsmoth v. Dunsmoth*, 1 Johns. Ch. 508.) After a reasonable time, trustees are *prima facie* liable for interest, and if they have retained money uninvested beyond such reasonable time, the burden is on them, on an accounting, to explain or justify it. If the executors in this case negligently omitted to make investments, or kept the fund idle for personal reasons, or if on the accounting, they render no explanation of the delay, interest may properly be charged against them, computed upon the principle adopted by the referee. (*King v. Talbot*, 40 N. Y. 76.) The facts bearing upon the liability of the defendants, either jointly or severally, for interest on uninvested funds, may upon a new trial be more fully developed, and the further consideration of the question at this time is unnecessary.

There does not seem to be any ground for charging the defendant Howard with the sum of \$786.60, received by the defendant Bailey on the exchange of the house and lot for the Kellogg farm. We find no evidence that the defendant Howard, had any knowledge of the transaction, or that the money ever came to his hands or under his control. There are some other items charged in the account to which objection is taken. The errors in respect to them, if they exist, are obvious, and can be corrected on a rehearing.

The executors excepted to that part of the judgment, which adjudges the determination and extinguishment of the unexecuted trusts, directed by the fifth and sixth articles of the will.

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By the fifth article, the executors are directed to set apart and invest \$10,000, on bond and mortgage, for the maintenance of the testator's daughter during her minority, and to pay the income to her thereafter, during her life, and in case of her death before the death of his wife, to pay the principal sum to her. By the sixth article, the testator gives to his wife an annuity of \$700, and directs his executors to invest on bond and mortgage, a sum sufficient to produce the annuity, and in case his daughter survives his wife, to pay over the same to her. The executors have never made any investment on the trusts directed by these sections of the will, and prior to the trial of this action, they transferred to the plaintiffs, all the real and personal estate of the testator in their hands. The testator's daughter, became of age in 1878, and the plaintiffs, who are the only persons interested, unite in asking that the trusts be extinguished. There are authorities which hold that it is in the power of a court of equity to decree the determination of unexecuted trusts of this nature, where the parties beneficially interested, unite in the application (*Smith v. Harrington*, 4 Allen, 566; *Perry on Trusts*, § 920, and cases cited.) Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to abrogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute. The beneficiaries, of trusts for the receipt of the rents and profits of land, are prohibited from assigning or disposing of their interest (1 R. S. 729, § 63), and this provision is held to apply, by force of other sections of the statute, to the interest of beneficiaries in similar trusts of personalty. (*Graff v. Bonnett*, 31 N. Y. 9.) This legislative policy, cannot we think be defeated by the action of the court permitting such alienation, or abrogating the trust. (See *Douglas v. Cruger*, 80 N. Y. 15.) The provision in the judgment in this case, abrogating the trust in question, was therefore unauthorized. Whether any practical difficulty now exists in the way of giving

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effect to the will of the testator, need not now be considered. It is sufficient to say that the principle that the courts may destroy trusts for support and maintenance, is sanctioned by the judgment in this case, and the judgment is also for this reason erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent.

Judgment reversed.

JOHN F. BRIGGS et al., Respondents, v. The CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK, Appellant.

Defendant received from plaintiffs, for collection, a check drawn upon a bank in New Jersey, and sent it by mail to the drawee, which was and had been for fifteen years its collecting agent in New Jersey, under an arrangement that all collections made by it for defendant should be credited to the latter in a collection account which was settled once a week. Said drawee, upon receipt, charged the check to the drawer and credited defendant with the amount in said account, and the next day suspended payment. In an action to recover the amount of the check, held, that the drawee, under said arrangement, had the right to discharge the drawer and substitute itself as debtor, which it did; and that defendant must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check, and was consequently liable therefor.

Indig v. National City Bank (80 N. Y. 100), distinguished.

(Argued March 15, 1882; decided May 30, 1882.)

APPEAL from judgment of the Court of Common Pleas in and for the city and county of New York, entered upon an order made April 4, 1881, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the amount of a check drawn on the First National Bank of Newark, and delivered by plaintiffs to defendant for collection. The drawee was and had been for fifteen years the collecting agent for defendant

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in New Jersey under an agreement that all collections made should be credited to defendant in a collection account, which was settled every Tuesday.

Defendant forwarded the check to the drawee by mail; it was received June 10, 1880, and was charged to the drawer, who was a customer, and credited to defendant in said collection account. The next day the drawee suspended payment and went into the hands of a receiver.

Geo. A. Strong for appellant. The Newark bank could not, either in fact or in law, be defendant's agent in reference to the Haines check. (*People v. Merchants' Bk.*, 78 N. Y. 269; *Indig v. City Bank*, 80 id. 100, 105, 106.) A man cannot act as agent for another in a transaction with himself. (*Clafin v. Farmers' Bk.*, 25 N. Y. 293; *Bentley v. Columbia Ins. Co.*, 17 id. 423; *Hardy v. Metropolitan, etc., Co.*, L. R., 7 Ch. App. 427.) Although a corporation acts by many different agents, it is considered as one individual as to third persons. (*Fairchild v. Ogdensburgh, etc., R. R. Co.*, 15 N. Y. 337.) Nothing will sustain an action for money had and received but proof of money actually received by defendant, either in person or by an agent. (*Nat. Trust Co. v. Gleason*, 77 N. Y. 400; *People v. Merchants' Bk.*, 78 id. 269, 273.) This case is to be decided under the law of agency, or of bailment, and not under the law of debtor and creditor. (77 N. Y. 327; *Leach's Case*, 52 id. 350, 353; 1 Parsons on Contracts [3d ed.], 187; *Shipsey v. Bowery Bank*, 59 N. Y. 485.) Under the law of agency or bailment, defendant is not liable on the facts shown for the loss caused by the insolvency of the Newark Bank. (*In re Parsons*, Ambler, 218; *Knight v. Lord Plymouth*, 3 Atk. 480; *Adams v. Claxton*, 6 Ves. Jr. 225; *Bacon v. Bacon*, 5 id. 331; *Leverick v. Meigs*, 1 Cow. 645; *Heubach v. Rother*, 2 Duer, 227.) There was no evidence showing the slightest default, negligence, or other misconduct on defendant's part. (*Shipsey v. Bowery Bk.*, 59 N. Y. 490; *Indig v. City Bk.*, 80 id. 103.) It was error to direct a verdict for the full amount of

the Haines check. In no event could more than nominal damages be recovered. (*First Nat. Bk. v. Fourth Nat. Bk.*, 77 N. Y. 329; *Burkhalter v. Second Nat. Bk.*, 42 id. 538; *Turner v. Bank of Fox Lake*, 4 Abb. Ct. of App. Dec. 434.)

A. Blumenstiel for respondents. The First National Bank of Newark being the collecting agent of the defendant, and authorized to collect this check, payment to it was a payment to the defendant, the principal. (*Faverie v. Bennett*, 11 East, 36; *Renard v. Turner*, 42 Ala. 117.) The transaction amounted to a payment. (*Bodenham v. Purchas*, 2 B. & Ald. 47; *Bolton v. Richard*, 6 Term R. 139; *Eyles v. Ellis*, 4 Bing. 112; 2 Wait's L. and Pr. 1064; Wait's Actions and Defenses, 381; *First Nat. Bk. of Jersey City v. Leach*, 52 N. Y. 352.) The failure of the agent to pay over is chargeable to the defendant and not the plaintiffs. (*Allen v. Merchs. Bk.*, 22 Wend. 115; *Cobbe v. Clark*, Seld. Notes of Cases, 11.) By charging the maker of the check with the amount and crediting the Central National Bank therewith, the First National Bank became the debtor to the Central National, and that could only occur on the theory that the transaction amounted to a payment. (*Com. Bk. of Penn. v. Union Bk.*, 11 N. Y. 214.) The defendant and not the First National Bank of Newark was the agent of the plaintiffs. There is no privity of contract between the latter bank and the plaintiffs, and they could not maintain any action against the Newark bank for this check, nor have they any claim against its receiver. (*Com. Bk. v. Union Bk.*, 11 N. Y. 211; *Montgomery Bk. v. Albany City Bk.*, 3 Seld. 469.) As between the two, the defendant became the creditor of the First National Bank of Newark, upon the credit being given by the latter to the former of the amount of the check, and the maker of the check was discharged and received back the voucher. (*Com. Bk. v. Union Bk.*, 11 N. Y. 211)

RAPALLO, J. In the case of *Indig v. National City Bank*, 80 N. Y. 100, it was decided that where a bank receives from

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one of its customers, for collection, a check or draft drawn upon another bank at a distant place, and for the purpose of collecting the paper, sends it by mail to the bank upon which it is drawn, with a request to remit the amount, the collecting bank, by so sending the paper to the drawee directly for payment, does not constitute the drawee its agent to receive the proceeds, and consequently does not become guarantor of the solvency of the drawee; and that in such a case, though the drawee has funds of the drawer of the paper, and charges it to his account as paid, but fails to pay over to the collecting bank, the latter is not responsible to its customer for the amount, unless there has been some negligence. The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds.

That case is sought to be applied to the present one, but the distinction between the cases is obvious. The plaintiffs here, for the purpose of establishing the agency of the drawee for the defendant (the collecting bank), do not rely upon the mere fact that the defendant sent the paper for payment directly to the drawee, but upon proof given at the trial that the drawee was, and had been for fifteen years back, the collecting agent of the defendant, under an arrangement that all collections made by the drawee for the defendant should be credited to it in a collection account, which was settled once a week, viz.: every Tuesday. That the collections made under this arrangement embraced commercial paper drawn on all banks and individuals in the State of New Jersey, including, therefore, paper drawn upon the agent itself. That the check in question was charged up to the account of the agent, and credited by it to the defendant, in this collection account, and under the arrangement the defendant had no right to call upon the agent for a settlement of this account until the Tuesday following. There can be no doubt that the drawee of the check had the right under this arrangement to discharge the drawer, and substitute itself as debtor to the defendant for the amount, and that it

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did so, and that the defendant must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check.

Under these circumstances the liability of the defendant to the plaintiff for the amount, as for a collection effected, is beyond question.

The judgment should be affirmed.

All concur except TRACY, J., absent.

Judgment affirmed.

ISAAC B. ELLSWORTH et al., Respondents, v. THE ÆTNA INSURANCE COMPANY, Appellant.

Two policies of fire insurance contained a condition that the company would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied. *Held* error; as although the condition had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages.

(Argued March 23, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought upon two policies of insurance issued by defendant to the firm of Ellsworth & Son, upon a stock of goods.

The material facts are stated in the opinion.

D. N. Lockwood for appellant. The non-compliance of the insured with a material condition contained in the policy is a good defense to the insurer, and the plaintiff is charged with

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the burden of proving all matters that stand as a condition precedent to his recovery. (*McLoom v. Com. Ins. Co.*, 100 Mass. 472; 98 id. 390; *Lobier v. Norwich Ins. Co.*, 11 Allen [Mass.], 336; *Bradhurst v. Columbia Ins. Co.*, 9 Johns. 18; *Heddon v. Eagle Ins. Co.*, 10 Gray, 131.) The rule is the same whether the condition is promissory, or relates to things past, present or future. It also applies to exceptions and conditions in the policy. (*Wilson v. Hampden F. Ins. Co.*, 4 R. I. 139; *Merchs. Ins. Co. v. Wilson*, 2 Md. 217; *Rogers v. Traders' Ins. Co.*, 6 Paige's Ch. 583; *Wheaton v. Albany City Ins. Co.*, 109 Mass. 24; 107 id. 140; 21 Wend. 600.) When fire occurs, the assured is bound to do all in his power to save the property. (*Wood on Ins.*, § 466; *Arnould on Marine Ins.* 836; *Mitchell v. Edie*, 1 Term R. 609.)

Joel L. Walker for respondent.

RAPALLO, J. Each of the policies upon which this action is brought contains a condition that the company shall not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property when on fire or exposed thereto, or after a fire."

The complaint, after setting out the loss by fire of the goods and furniture insured, avers that said loss was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property when exposed to fire."

The answer contains general denials sufficient to put this allegation in issue.

On the trial evidence was given touching the circumstances attending the fire, from which it appeared, as stated in the case, that the plaintiff Isaac, with his wife, and his son the plaintiff Frank, lived on the floor over the store which contained the insured goods. That at about one or two o'clock in the morning, Isaac, hearing the dog in the store bark, got up and went down into the store, unlocked and opened the front door, and let the dog out, then shut and locked the door, and hung up the key, and went to bed, leaving the kerosene lamp burning in the store. He afterward heard the dog bark, and got up again.

He then perceived smoke, alarmed his wife and again went down into the store, and found fire blazing up from behind the counter where the lamp hung. He then unlocked the front door, and threw out two boxes of shoes, and then turned to go up stairs, and met his son Frank and his wife at the foot of the stairs and told them to go back and save what they could up stairs, and they all went back and commenced picking up and throwing things out of the window. No effort appears to have been made to throw out any more goods from the store, and it is to be inferred from the evidence, that Isaac, before returning up stairs, must have relocked the front door of the store, for he says he heard people pounding at it, trying to open it, but they could not and they called to him to throw down the key, and he told them he had not got it, and they got a timber and broke in the door. No explanation is given of the re-locking of the store door, or the loss of the key, or of the omission to continue to throw goods out of the store.

Ebenezer White, a witness for the defendant, testified that he was at the fire, and being asked whether any thing was said about going into the cellar to get out goods, and what Ellsworth said, answered that they stood close to the building, and Ellsworth said, beware there is powder in the building, or something to that effect. There was other testimony touching the conduct of the parties at the fire, which the jury might have taken into consideration had the question of efforts to save property been submitted to them.

The counsel for the defendant asked the court to charge the jury that the plaintiffs could not recover "for any loss or damage occasioned by their, or either of their, neglect to use all possible efforts to save or preserve the property when on fire, or exposed thereto." The court refused this charge, and the defendant's counsel excepted.

For what reason this charge was refused, is not explained. It does not appear that any objection was made that neglect to save goods could not be shown under the pleadings. The request was almost in the precise words of the condition, and although the condition was not set up in the answer as a de-

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fense, issue had been tendered in the complaint as to its breach, and the question was one which affected the amount of damages, to be recovered, even if the defendant failed to sustain its defense to the action.

We think that it was error to refuse to charge as requested.

Judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent.

Judgment reversed.

HENRY W. SAGE et al., Respondents, v. THE CITY OF BROOKLYN, Appellant.

A law authorizing the taking of a man's land, without the pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the compensation, but remitting the owner for his sole remedy to a fund to be obtained by taxation, according to benefits, of certain specified lands in a limited assessment district, is not a sure and adequate provision, dependent upon "no hazard, casualty or contingency whatever," such as is required to meet the constitutional prohibition against the taking of private property without making compensation.

The courts must so construe a statute as to bring it within the constitutional limitations if it is susceptible of such a construction.

The act of 1868 (Chap. 631, Laws of 1868), widening Sackett street in the city of Brooklyn, provided for a municipal, not a State improvement, and imposed upon the city the ultimate duty of paying the land-owners for the lands taken. (RAPALLO and EARL, JJ., dissenting.)

The provision of the city charter of 1854 (§ 16, tit. 4, chap. 384, Laws of 1854), directing the city comptroller to pay to persons to whom damages have been allowed for lands taken for street improvements, which provision is made applicable to proceedings under said act of 1868 (§ 7), imposes a duty upon the corporate body the city, not by a *descriptio personarum* upon the individual holding that office. (RAPALLO and EARL, JJ., dissenting.)

Where, therefore, lands of plaintiffs were taken for said improvement and an award made to them therefor by the commissioners of estimate and assessment, but the comptroller refused to pay the award, as the assessment made for the improvement was only collected in part, and the amount collected was paid out in payment of claims presented before the presentation of plaintiffs', *held*, that an action was maintainable against

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the city to recover the sum awarded. (RAPALLO and EARL, JJ., dissenting.)

Also *held*, that the exemption clause in the act of 1862 (§ 39, chap. 63, Laws of 1862) was not applicable. (RAPALLO and EARL, JJ., dissenting.)

(Argued November 29, 1881 ; decided May 30, 1882.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made July 8, 1880, which affirmed a judgment, in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought to recover the amount of an award made to plaintiffs for an interest in lands taken for the widening of Sackett street, in the city of Brooklyn.

The material facts are stated in the opinion.

William C. De Witt for appellant. The title of the easement of way, known as the Sackett street boulevard, is not in the city of Brooklyn, but was acquired by the people of the State of New York by virtue of a special act of the legislature, through a special commission acting in their behalf, and for whose acts, either of nonfeasance or misfeasance, the city of Brooklyn is in no way responsible. (*Maximillian v. The Mayor*, 62 N. Y. 160 ; *Russell v. The Mayor*, 2 Den. 464-5, 473, 481-2-3 ; *New York and Brooklyn Saw-mill & L. Co. v. The City of Brooklyn*, 71 N. Y. 580 ; *Martin v. Brooklyn*, 1 Hill, 545, 550-1 ; *King v. The City of Brooklyn*, 42 Barb. 627 ; *Lorrillard v. Town of Monroe*, 11 N. Y. 392 ; Laws of 1860, chap. 488, §§ 16, 17, 1-2 ; Laws of 1868, chap. 821 ; Laws of 1869, chap. 861 ; Laws of 1871, chap. 926 ; Laws of 1872, chap. 493 ; Laws of 1874, chaps. 572, 583 ; Laws of 1875, chap. 489 ; Laws of 1881, chap. 519 ; *Astor v. Mayor, etc.*, 62 N. Y. 567 ; *People, ex rel. v. McDonald*, 69 id. 362 ; *Maximillian v. Mayor*, 62 id. 164, 165, 168 ; *King v. Brooklyn*, 42 Barb. 627 ; *People, ex rel. Nicholson Pavement Co., v. Kalbfleisch*, MSS., Gen. Term, 2d Dept., 1868 ; *Riley v. Brooklyn*, Sup. Ct. Kings Co. Circuit, 187 ; Constitution, art. 1, § 11 ; *Wendell v. People*, 8 Wend.

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183, 189; *Gould v. H. R. R. Co.*, 6 N. Y. 522; *Cornell v. Butternut Turnpike Co.*, 25 Wend. 365, 367-8; *People v. Kerr*, 27 N. Y. 188, 198; *Matter of John and Cherry Sts.*, 19 Wend. 676-7; *Embury v. Arnott*, 3 N. Y. 517; *Matter of Albany St.*, 11 Wend. 149; *Matter of Ninth Ave.*, 45 N. Y. 729; Laws of 1868, chap. 631, § 11, p. 329.) So far as the comptroller, or tax collector, or registrar of arrears acted, or failed to act, in this proceeding, under the said act of the legislature, they acted, or failed to act, as State agents and officers, for whose conduct the city is not liable in its corporate capacity. (Laws of 1873, chap. 363, title 19, § 27; *Gray v. City of Brooklyn*, 2 Abb. Ct. of App. Reps. 269; Laws of 1881, chap. 443, p. 602; chap. 154, p. 685.) The comptroller was not guilty of negligence. (*Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Baker v. Johnson*, 2 Hill, 342; *People v. Hayden*, 6 id. 359; *Rexford v. Knight*, 11 N. Y. 313-14.) The tax collector was not guilty of negligence. (Charter of 1873, chap. 863, title 8, § 3; title 2, § 18.) The order of the Supreme Court, confirming the report of the commissioners of awards and assessments, is a final judgment respecting the validity of their proceedings, and cannot be called in question in this action. (*Dolan v. Mayor*, 62 N. Y. 472; *Matter of Arnold*, 60 id. 26; *Methodist Church v. New York*, 55 How. Pr. 57; *Morewood v. New York*, 6 id. 386.) The act of 1868, so far as it relates to the Sackett street boulevard, or the subject-matter of the present action, is constitutional. (*Matter of Sackett, Douglass and Degraw Sts.*, 74 N. Y. 95; *People v. Mayor of Brooklyn*, 4 id. 430.)

Joshua M. Van Cott for respondents. The statutes under which the respondents' land was condemned and taken, impose upon the taker the duty to make just compensation and to make it with diligence and reasonable promptness. (*People v. Hayden*, 6 Hill, 359; *Chapman v. Gates*, 54 N. Y. 144. *People v. City of Syracuse*, 78 id. 56; *Brooklyn Park Comm'rs v. Armstrong*, 45 id. 244.) For its neglect and failure the city is liable in damages, and the measure of dam-

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ages is the amount of the awards, with interest. (*Adsit v. Brady*, 4 Hill, 630; *Hover v. Barkhoof*, 44 N. Y. 113; *People v. Supervisors of Otsego*, 51 id. 401; *People v. Supervisors of Livingston*, 68 id. 114; *Brewster v. City of Syracuse*, 19 id. 116; *Town of Guilford v. Supervisors of Chenango*, 13 id. 143; *McCullough v. City of Brooklyn*, 23 Wend. 458, 460-1; *Beard v. City of Brooklyn*, 31 Barb. 142; *Cummings v. Brooklyn*, 11 Paige, 569; *Baldwin v. City of Oswego*, 2 Keyes, 132; *Ganson v. City of Buffalo*, 1 id. 454; *Clark v. Miller*, 54 N. Y. 528; *Marsh v. Town of Little Valley*, 64 id. 112; *Sibley v. City of Mobile*, 4 Am. L. T. Rep. [N. S.] 226; *United States v. Clark County*, 5 Reporter, 131; *Paulding v. Cooper*, 10 Hun, 20; *S. C.*, 74 N. Y. 619.) The acts under which the respondents' land was taken for public use are not open to the objection that they do not suitably provide for the payment of a just compensation, as prescribed by the Constitution. (Albany Act, 1801; 2 Laws, 153; 6 Johns. 1; 7 id. 541; New York Act, 2 Rev. Laws of 1813, 408; Brooklyn Act; chap. 384, Laws of 1854; Laws of 1868; Washington Park Act, Laws of 1847, chap. 142, § 6; *Matter of Washington Park*, 1 Sandf. Sup. Ct. 283; Brooklyn Park Act, §§ 5-10-13, chap. 340, Laws of 1861; New York Park and Street Act, §§ 1, 4, chap. 565, Laws of 1865; *Matter of Deering*, 85 N. Y. 1; Laws of 1870, chap. 623; *People v. McDonald*, 69 N. Y. 362; *Matter of Sackett Street*, 74 id. 96; *Shepherd's Touch*. 80; *Co. Litt.* 42a; 52 N. Y. 18.) Every possible intendment must be allowed in favor of their validity. (*Embury v. Connor*, 3 N. Y. 511; *Ryder v. Stryker*, 63 id. 136, 139, 140; *Talbot v. Hudson*, 16 Gray, 417, 422; *Wellington, Petitioner*, 16 Pick. 96.) It is in the legislative discretion to provide what public improvements shall be made, and whether their cost shall be a State or local charge. (*Lorillard v. The Town of Monroe*, 11 N. Y. 392; *People v. Town Auditors*, 74 id. 310; *Phelps v. Hawley*, 52 id. 23; *Ensign v. Superv'rs of Livingston*, 25 Hun, 20; *People v. Superv'rs of Livingston*, 68 N. Y. 114; *Coster v. Albany*, 43 id. 399.) Incorporated municipal governments have a corpo-

rate *status* essentially different from towns and counties, and, in consideration of their franchises, they bind themselves by an implied contract with the State to perform duties and fulfill obligations which result from accepting and acting under the powers delegated to them, and in respect of which actionable remedies result to individuals for a breach of such duties and obligations. (*Conrad v. Trustees of Ithaca*, 16 N. Y. 158; *Hogan v. The Mayor*, 68 id. 17; *Matter of Zoborowski*, id. 88; *Matter of Deering*, 85 id. 399; *Coster v. City of Albany*, 43 id. 399; *People v. Kelly*, 76 id. 440, 487, 490; *Matter of Sackett St.*, 74 id. 95, 100, 101.) The city is liable for having been grossly negligent and derelict, in its failure to use its powers to collect assessments and pay the awards. (*Bronson v. Kinzie*, 1 How. [U. S.] 311; *McCracken v. Hayward*, 2 id. 608; *Grantley's Lessee v. Erving*, 3 id. 707; *Curran v. Arkansas*, 15 id. 304; *Hanorthorne v. Calef*, 2 Wall. 10; *Green v. Biddle*, 8 Wheat. 1; *Dikeman v. Dikeman*, 11 Paige, 484; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; *Quin v. Buffalo*, 13 Weekly Dig. 526; *Moore v. The Mayor*, 73 N. Y. 239.) It is liable on the further ground, that it received the bulk of the assessment fund, and was charged with a trustee's duty to pay it equally to the beneficiaries of the fund, and committed a *devastavit* in paying the whole of it to others to the exclusion of the respondents. (*Swift v. The Mayor*, 83 N. Y. 536, '7; *People, ex rel. Dannat, v. Comptroller*, 77 id. 45, 50; *Risley v. Smith*, 64 id. 576; *Kingsley v. Brooklyn*, 78 id. 200.) The exemption clause in the acts of 1862 (Laws of 1862, § 39, pp. 203, '4) and 1873 (Laws of 1873, title 19, § 27), does not exempt the city from liabilities resting upon the corporation for money received into its treasury, and which has been misapplied. (*Kingsley v. Brooklyn*, 78 N. Y. 200; *Gray v. Brooklyn*, 2 Abb. App. Dec. 267.)

ANDREWS, Ch. J. The legislature by chapter 631, Laws of 1868, widened Sackett street in the city of Brooklyn, to the width of two hundred and ten feet. The commissioners of

Prospect Park were directed by the act to take proceedings within sixty days after its passage, to open, grade and otherwise improve the street, and for the purpose of determining the amount to be paid to the land-owners for the lands required for the improvement, to apply to the court upon notice to be personally served on the counsel of the city, and to be also published for ten days in the corporation newspaper, for the appointment of commissioners to estimate the expense of the improvement and the damages of the land-owners, and to apportion and assess the same upon the property benefited within the district of assessment to be fixed by the park commissioners. (§§ 4, 5, 10.) The commissioners of estimate and assessment awarded to the plaintiffs for their lands within the limits of the widened street the sum of \$7,125, and the award was duly confirmed February 28, 1870. The improvement was completed in 1873, and the street so widened and improved, forming a broad avenue bordering on Prospect Park, has since that year been open to public use.

The plaintiffs have never been paid their award. The aggregate amount of awards made for lands taken for the improvement was \$334,000, which was assessed upon the lands within the assessment district. The sum of about \$280,000 was collected and paid into the city treasury, and was paid out by the comptroller as claims were presented until the fund was exhausted. The balance of the assessment has not been collected. The lands assessed on which the assessments are unpaid, have been offered for sale by the city, but by reason of the accumulations of assessments thereon beyond their value, there were no bidders, and this resource for the payment of awards is practically valueless. The plaintiffs presented their claim to the comptroller of the city for payment, but payment was refused on the ground that the amount collected had been paid out to claimants who had presented their claims before the presentation of the claim of the plaintiffs. This action was subsequently brought to recover the award, as a debt owing by the defendant. The city denies its liability, and asserts that it owes no duty to pay the plaintiffs for their lands; that the

widening of Sackett street was a State, and not a municipal improvement, and that the only special relation which the city sustained to the award, grew out of the fact that the State for its convenience availed itself of certain existing municipal agencies to collect and pay over the assessments to the parties entitled to payment.

This contention, if well founded, substantially deprives the plaintiffs of any remedy. It is not claimed that the State assumed any liability under the act of 1868. The act charged the expense of the improvement upon a limited assessment district, and it turns out that the property therein is inadequate, or cannot be sold to pay the assessments in full. If no immediate or ultimate duty is imposed on the city to pay the awards, or make good any deficiencies in the assessment fund, then we repeat the plaintiffs are without remedy to recover their award. The position of the city, if sustained, leads to the inevitable conclusion that the lands of the plaintiffs were never lawfully taken for the improvement, that their title has never been divested, and that they may now enter upon and reclaim the exclusive possession of the lands of which they have been deprived.

It is so axiomatic, that it is laid up as one of the principles of government, that a provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property under the right of eminent domain. (*Gardner v. Village of Newburgh*, 2 Johns. Ch. 168.) The courts in construing the constitutional guaranty, have departed from what may seem its plain and natural meaning, and have held that the payment for property taken *in invitum* for public use, need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking, also provides a sure, sufficient and convenient remedy by which the owner can subsequently coerce payment by legal proceedings. If such provision is not made, then, as was said by NELSON, Ch. J., "the law making the appropriation is no better than blank paper." (*People ex rel. Utley v. Hayden*, 6 Hill, 359.) It is, I think, a plain proposition, that a law authorizing the

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taking of a man's land, and remitting him for his sole remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate provision, dependent upon no "hazard, casualty or contingency whatever," such as law and justice require to meet the constitutional requirement. The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law. But a remedy for compensation, contingent upon the realization of a fund from taxation for benefits within a limited assessment district, does not meet the constitutional requirement. The inadequacy of such a provision finds in the circumstances of this case ample illustration. (See *Chapman v. Gates*, 54 N. Y. 146.)

In coming to the inquiry whether the city of Brooklyn is charged with the duty of paying the awards for the opening of Sackett street, we are to bear in mind that all acts of the legislature are judicially construed to be within constitutional limitation if susceptible of a construction which would make them so, and that "the court, if possible, must give a statute such a construction as will enable it to have effect." (Cooley's Const. Lim. 184.) This is but a corollary from the principle asserted by Mr. Justice WASHINGTON in *Ogden v. Saunders* (12 Wheat. 270), and frequently repeated in subsequent cases, that "it is but decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." The legislature, in passing the act for the opening of Sackett street, intended to make a valid and effective law, and we may reasonably expect to find provisions therein which shall make it accord with the Constitution.

The claim that the opening and widening of Sackett street is a State, as distinguished from a municipal improvement, is op-

posed to the inferences flowing from the nature and object of the improvement, its connection with the system of parks in Brooklyn (of which it is an adjunct) and from the provisions of the act itself. The State, it is true, took the lands required for the widening of Sackett street by direct legislative enactment (§ 1). It also committed to the park commissioners the initiation of the proceedings for opening the street, investing them, for that purpose, with the powers which, under the general law relating to street openings in Brooklyn, are conferred upon the common council (§§ 4, 5). The act also placed the street, when opened, under the exclusive control and management of the park commissioners (§ 11). But these provisions are not inconsistent with the theory that the opening of Sackett street was a city improvement. The same features are found in the Prospect Park Act of April 17, 1860. The legislature, in that act, declared certain designated lands "to be a public place to be known as Prospect Park" (§ 1); the park was placed under the exclusive control and management of the park commissioners (§§ 16, 18), and by the third section it is declared that the lands "shall be deemed to have been taken by said city of Brooklyn for public use." By other provisions the city was to be vested with the fee of the lands taken, upon payment being made therefor. A municipal corporation is the creature of the State, deriving its public faculties and political powers from the legislature. The legislature may, in place of remitting the question to the discretion of the city authorities, prescribe what local improvements shall be made, and create special agencies for their execution. It is not required to commit their execution to the ordinary representatives of the municipal body; and it may charge the expense of such improvements upon the locality. It does not, therefore, go far toward establishing the claim that a street improvement within a city is a State and not a municipal work, to show that it was directed by the legislature, and that its execution was committed to special agents appointed by the legislative act. In the case of Sackett street, the improvement was not one in which the State at large was specially interested, nor did the State assume

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the burden of the expense. The people at large were interested in the same sense and no other, that they are interested in the opening of every highway within the State. But the improvement was peculiarly for the local convenience and advantage of the city of Brooklyn. When the act of 1868 was passed, Sackett street was designated on the commissioners' map of the city as one of the city streets. The improvement to be made was limited territorially to the city. The unusual width of the proposed avenue was fixed, as may be inferred, not because the accommodation of public travel required so wide a street, but because it was supposed that a wide avenue, set with trees and otherwise improved, would enhance the beauty and attractiveness of the city, and promote the pleasure and comfort of its citizens. The improvement was, as we have said, a part of the park system, and it was with great propriety placed under the control of the park commissioners. That the improvement of Sackett street was regarded by the legislature as a city and not a State improvement also plainly appears from the supplementary act, chapter 592, Laws of 1873. The park commissioners were by that act authorized and directed to improve Sackett street by grading, paving, planting shade trees, constructing carriage-ways, etc., and, by the fourth section, the city was required to issue its bonds for the purpose of raising money to pay the expense of the improvement, and the money collected on assessments was directed to be paid to the commissioners of the sinking fund, for the redemption of the bonds. We think then there can be no doubt that the widening and improvement of Sackett street was a local, municipal improvement, as completely as if it had been primarily undertaken by the city under the general powers conferred by the charter.

It remains to consider whether the statute of 1868 imposed upon the city the primary or ultimate duty of paying the land-owners for the land taken for the street; for we think it must be admitted upon the doctrine of *McCullough v. The Mayor, etc.* (23 Wend. 458), that unless the statute imposes the duty it cannot be implied from the mere fact of the taking of the

land for a city street. The authority to take, and the duty of the corporation to pay for the land taken, depend upon positive law. The authority to take will be ineffectual unless accompanied with proper provisions for payment, but the duty of the corporation to pay the land-owners must be found in the affirmative prescriptions or reasonable intendments of the statute. But we think the obligation of payment was imposed on the city. The seventh section of the act of 1868 makes all laws in force relative to the widening, opening and improving streets in the city of Brooklyn (with certain exceptions not here material), applicable to proceedings under the act. By the charter of 1854 (Chap. 384), in force when the act of 1868 was passed, power was conferred on the common council to open and widen streets within the city, upon petition, etc. The *fourth* title relates to assessments for local improvements, and provides for ascertaining and awarding the damages of land-owners for land taken for streets. The sixteenth section is as follows: "The city comptroller shall pay to the persons (or to the attorneys or legal representatives of such persons) to whom damages may have been allowed in such report the amount of such damages, without any deduction therefrom by way of fee or commissions." This section was plainly incorporated into the Sackett Street Act by the seventh section referred to. If this could be successfully controverted, the result would be that there is in the Sackett Street Act, no direction whatever for the payment of the land-owners, and their right to payment (under the act) if it existed at all, is left to inference from the provision for an assessment of damages awarded for lands taken. The direction in section 16, that the comptroller shall pay the land damages, is absolute and unqualified. It is not a direction to pay them out of the assessments when collected or out of a particular fund. It is doubtless true that the act of 1868 was a local improvement act, and in accordance with the general theory of such acts, the expense of the improvement was made a local and not a general charge. But it is not inconsistent with this theory that the municipality may be required to pay the cost of the improvement in anticipation

of the collection of assessments therefor. This is precisely what was done under the supplementary act of 1873, to which we have referred, in respect to the expense of grading, regulating, etc. The city, under that statute, was required primarily to advance the necessary funds. The provision in the act of 1873 furnishes a strong inference, in favor of the claim that the legislature by incorporating section 16 of the charter into the act of 1868, intended to impose upon the city the duty, either primary or ultimate, of paying the land-owners. The acts of 1868 and 1873 are *in pari materia*, and it would be an anomaly which it cannot be reasonably supposed the legislature intended, that the city should be bound to pay for paving and regulating the street, and be under no obligation to pay for the land taken therefor. There are doubtless some difficulties in the construction we have given to the act of 1868, but none we think which cannot be resolved, and courts are bound to go to the very verge of construction to sustain the constitutionality of statutes.

It is clear, we think, that the duty imposed by section 16, is a duty imposed upon the corporate body—the city, and not, by a *descriptio personæ*, upon the individual who may happen to be comptroller. The comptroller could not as an individual execute the directions given. He is, by the charter, the chief financial officer of the city. But he neither receives nor has the custody of money received from local assessments. The charter requires that the collector shall pay the money collected thereon to the city treasurer, who is required to deposit it to the credit of the city in such banks as the common council may direct. (Laws of 1854, chap. 384, title 3, § 15, title 5, §§ 11, 15.) And it prohibits any money being drawn from or paid out of the treasury, except in pursuance of orders of the common council appropriating the same, and upon warrants signed by the mayor and countersigned by the treasurer and city clerk. (Title 3, § 15.) According to common understanding, a direction to the chief financial officer of a city, State, or of the general government, to pay money for a public purpose, is a direction that the State, government or

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municipality pay the sum stated. This is especially so in a case like this, where the direction is found in a charter act, and relates to a duty of a public character. (*N. Y., eto., Lumber Co. v. Brooklyn*, 71 N. Y. 580.)

We have been referred to title 18, section 6, of the charter of 1873, as indicating a legislative policy to exempt the city of Brooklyn from any liability for land taken for streets. If that clause has the construction placed upon it by the counsel for the respondent, the validity of the charter in respect to acquiring lands for streets, may well be doubted. If, however, it is construed as relating simply to the expense of regulating streets, to which it was confined in the original act from which it was taken (Chap. 213, Laws of 1859), or is intended only to declare the general principle that the expense of street openings shall be a local and not a general charge, it is not subject to criticism. But however this may be, that clause does not govern the rights of the parties in this case which are regulated by prior statutes, and were fixed before the charter of 1873 was framed.

The exemption clause in the act of 1862, (Chap. 63, § 39), is not a defense. The duty of payment imposed by the act of 1868, is a corporate duty, and one from which the city can be relieved only by performance. It is not a duty imposed upon the common council or any officer of the city, and the case is not within the purview of the act of 1862. We think the liability of the defendant was properly adjudged in the courts below, and it is a satisfaction that this conclusion, warranted as we think it is by the rules of law, accords with equity and justice.

The judgment should be affirmed.

EARL, J., (dissenting.) The plaintiffs sued and recovered for an award made to them for land taken to widen Sackett street under the act chapter 631 of the Laws of 1868, and the sole question for our determination upon this appeal is, whether the city became responsible upon the facts proved for that award. Section 1 of the act, by its own terms, *ex proprio vigore*, widened Sackett street and appropriated the land needed therefor.

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Section 4 directs the commissioners of Prospect Park to take the proceedings for widening that street and making the other improvements mentioned in the first and second sections of the act; and for the purpose of determining the amount to be paid to the owners of the lands and tenements taken for the purpose of the several changes and improvements contemplated by the act, they were required to make application to the Supreme Court in the second judicial district at a Special Term thereof, upon notice to be served upon the counsel of the city and to be published in the corporation newspapers, for the appointment of three commissioners to estimate the expense of such widening and opening, and the amount of damages to be sustained by the owners of the land, and by other persons to be affected thereby, and to apportion and assess the same as directed; and the court was required upon such application to make such appointment. By section 6 the commissioners so to be appointed were required to proceed to estimate such expense and damage, and to make their report thereon to the court, and after confirmation of such report, they were required to apportion and assess the amount thereof, in such manner as they should deem just and equitable, upon the lands and premises in their judgment benefited by the improvement within the district of assessment to be designated by the park commissioners as provided in the act. The commissioners thus appointed, in February, 1870, awarded to the plaintiffs the sum of \$7,125, and for the purpose of raising money to pay such award and other awards made to land-owners, they laid an assessment upon lands benefited to the amount of nearly \$350,000, about \$13,000 of which was laid upon lands of the plaintiffs and paid by them. All the assessments thus laid, excepting about \$50,000, were voluntarily paid or collected and placed subject to the control of the comptroller of the city, and the moneys thus realized were paid upon warrants drawn by him in satisfaction of awards in the order of their presentation, leaving no money to apply upon the award made to the plaintiffs.

Under the provisions of the act of 1868, the assessments were required to be collected under the general laws relative to the

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collection of assessments applicable to the city of Brooklyn. The assessments upon the lands along the line of the improvements were so great, that although they were advertised and offered for sale on many different occasions in the years 1871 and 1872, no bids could be obtained, and the balance of the assessments was thus not collected. In the courts below the plaintiffs' claim was sustained upon some one or more of these grounds. *First*, that the city had taken their lands and having had a reasonable time to pay them therefor, and having failed to do so, was liable as a corporation for the amount awarded them. *Second*, that the comptroller was guilty of misfeasance in paying the awards, as he did, in the order of presentation and not *pro rata* from the money collected, and that the city was therefore bound to make good plaintiffs' claim. *Third*, that there was negligence on the part of the tax collector in respect to the collection of the assessments, in consequence of which the plaintiffs have been deprived of their compensation.

There is nothing in the act of 1868 imposing any duty or conferring any authority upon the city in reference to the improvement of Sackett street. Even after the improvement was made under the direction of the park commissioners, the city was to have no control over Sackett street, section 11 providing as follows: "After Sackett street shall have been opened, so much thereof as lies eastward from Prospect Park shall be under the exclusive control and management of the said park commissioners, and they shall make and enforce proper rules and regulations for the public use thereof, and after it shall have been improved, as hereinbefore directed, its subsequent maintenance shall be provided for in the same manner as the public parks now under the charge of the said park commissioners are provided for."

The land taken for the widening of Sackett street was not transferred to the city. The fee remained in the original owners and an easement even was not vested in the city, but in the people of the State. It is impossible to perceive upon what theory it can be held that the city took the land, as it acquired no interest therein. It was taken and appropriated by the di-

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rect act of the legislature, and by the same act the park commissioners were appointed to enter upon the land and make the improvement. They were not the agents of the city, but State agents. They were not officers of the city, and, in what they did, they did not represent the city, and had no authority in any way to bind it, and could in no way make it responsible for these awards. They had the precise authority conferred upon them by the act and no other, and the liability of the city for their acts or for the land taken, or the awards made is not so much as hinted at by the act.

For the position that the park commissioners were not agents of the city for whose acts the city could be made responsible, the cases of *Maxmilian v. The Mayor* (62 N. Y. 160), *Tone v. The Mayor* (70 id. 157), and *New York & Brooklyn Saw-Mill & Lumber Co. v. The City of Brooklyn* (71 id. 580) are abundant authority. The general rule as deduced from these cases is that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed upon him, which is not connected with his duties as agent of the corporation, and that such a corporation is only liable for the acts or omissions of officers in the performance of duties imposed upon the principal.

If the statute had imposed an absolute duty upon the city to pay the awards to be made under the act, there would have been foundation for the maintenance of the action; but without some such provision we think there are no principles and certainly no authority sanctioning this recovery. In *McCullough v. The Mayor* (23 Wend. 458), the action was to recover money awarded to the plaintiff for land taken for opening a street, and it was held the plaintiff could not recover, because by the statute authorizing the street improvement the award was not declared to be a debt against the city, and because the statute did not make it the duty of the city to pay the money. That was a case where the street was opened by the city, and the statute under which the proceeding was taken required that when an order was made which required the corporation of the city of Brooklyn to lay out or open any new street, or widen or extend

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an old one, commissioners should be appointed to estimate and assess the amount of damages and benefits to be sustained and derived by the owners of lands and buildings affected by the improvement. The commissioners were required to make a report, and after the report was confirmed, the persons assessed for benefits were authorized to pay the money to the city treasurer, and if not paid within the time specified, the assessments were to be collected on the warrant of the corporation by the city collector, who was authorized to levy upon goods and chattels of the persons assessed, and the money when collected was to be paid to the treasurer, and the treasurer was required to pay the money over to the persons to whom awards for damages had been made. If the collector could not find any goods or chattels to satisfy the assessments he was to certify the fact to the common council, upon which they were authorized to proceed and sell the lands. In that case BRONSON, J., said: "In such a case I am unable to see that any other duty or obligation rests on the corporation than that of putting the necessary machinery in motion according to the requirements of the statute. If the common council neglected that duty or has been wanting in diligence, an action on the case would perhaps lie in favor of any one who like the plaintiff would be entitled to the money when collected; but a *mandamus* would be a more appropriate remedy." In *Stafford v. The Mayor of Albany* (6 Johns. 1, and 7 id. 541), an action of *assumpsit* for the recovery of money awarded for land taken for street purposes by the city of Albany was sustained upon the express ground that the benefits of the improvements were not charged upon individuals, and that there was an express provision that the damages should be paid by the corporation. Speaking of these cases Judge BRONSON, in *McCullough v. The Mayor of Brooklyn*, further said: "There was a duty on the part of the corporation to pay the money, and the decision was put upon that ground. So in New York, although the burden is ultimately to fall upon the persons benefited, the damages awarded are, for a limited time, to be paid by the corporation. (2 R. L. 418, § 183.) The legislature has not imposed any such burden upon the corporation of Brooklyn, and this action cannot be maintained."

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In the act now under consideration the land for the street improvement was not only not taken by the city, but the act contains no provision making it the duty of the city to pay the awards for such lands out of its treasury. The act made particular provision as to how the awards were to be paid, and resort can be had to that provision only for payment.

In *Cumming v. The Mayor etc. of Brooklyn* (11 Paige, 596), the corporation of the city of Brooklyn contracted with the complainants to grade and regulate one of the avenues of that city at a specified price, to be paid for out of the moneys which were to be collected by an assessment to be made for such improvement, and it was held that an action could not be maintained for the recovery of the amount due upon the contract, but that an action could be maintained because the city had not caused a proper assessment to be made, and the money thus collected. That was a case where the improvement made was a city improvement, and the city had legally bound itself by contract, and it was made liable for a breach of its contract.

In *King v. The City of Brooklyn* (42 Barb. 627), the legislature, by an act passed April 17, 1861, provided for the widening of Fourth avenue in the city of Brooklyn, and appointed a board of commissioners with power to open and work the same, and until the work was completed all control over the avenue was taken from the common council and given to the commissioners. The city was directed to issue its bonds to a certain amount and to pay the money realized therefrom to the city treasurer, and the same was to be kept separate and paid out upon the order of the commissioners only, and to be used for no other purpose. The act did not provide that the corporation of the city of Brooklyn should accept of or assent to it. The commissioners named in the act contracted in their own names with K. and B. for certain work to be done upon the avenue by K. and B., at stipulated prices, which work was performed by the latter. In 1862 the legislature enacted a new charter for the city of Brooklyn, by which there was created a board of contracts, which board only could bind the city by contract, except in

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certain specified cases, and it was held: *First*. That the avenue commissioners were not, by operation of law, the agents of the city. *Second*. That if the city was liable to K. and B. upon the contract, it was liable to pay as directed by the statute, from the fund and in the precise manner therein prescribed, solely by force of the legislative power of taxation. *Third*. That the fund raised under the act of 1861 was the only fund with reference to which K. and B. contracted with the commissioners; that they could be paid in no other way than under and by virtue of that act. *Fourth*. That the new charter of Brooklyn did not repeal the act of 1861 appointing the Fourth avenue commissioners. *Fifth*. That an action would not lie against the city by K. and B. upon the contract, until the fund should have been raised by the sale of the city bonds and the proceeds paid to the city treasurer, and the avenue commissioners had given their order on the treasurer in favor of K. and B. *Sixth*. That K. and B. must produce the order from the commissioners, and if the order was unjustly refused the remedy was by *mandamus*.

Even if this street widening was a street improvement inaugurated and carried on by the city, for which it was bound to provide payment, it could not be sued and compelled to pay out of its general funds, unless it was chargeable with fault and negligence in not collecting the assessments imposed to raise money to pay the awards. (*Hunt v. The City of Utica*, 18 N. Y. 442; *Baker v. The City of Utica*, 19 id. 326; *Baldwin v. The City of Oswego*, 1 Abb. Ct. App. 62.) In the latter case it was held that a contractor employed for the making of a local improvement, the expense of which, under the charter, was to be assessed, not upon the city at large but only on the property benefited, cannot maintain an action for his compensation against the municipal corporation directly on the contract to recover a judgment which shall be a charge upon the general resources of the city. It was, however, held that if the common council, or officers of the city having power to raise the necessary funds by assessment, neglected to do so, the action would lie upon the ground of negligence.

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In *Ganson v. The City of Buffalo* (2 Abb. Ct. App. 242), it was held that, where the charter of a city requires the common council to make a compensation in money within a fixed time, for land taken for a local improvement, and makes such compensation a general debt or charge upon the city, an action lies against the city therefor after the time limited has expired, although the city has not collected the amount from the parties assessed; and that decision was based upon the circumstance that the city charter made it the absolute duty of the city to pay the compensation. It was also held in that case that the remedy of the plaintiff would have been by *mandamus* if the charter had provided that the compensation due him should be paid out of the assessments. In *Swift v. Mayor, etc., of New York* (83 N. Y. 528), it was held that where a particular mode of discharging the obligations of a municipal corporation is provided by law, that mode must be pursued; and that it is only when the corporation is put in default in omitting to discharge some duty imposed upon it by statute, after the proper steps have been taken, that an action will lie against it, unless it has, by some act of its own outside of the original indebtedness rendered itself liable; and the observations and reasoning of RAPALLO, J., writing the opinion of the court in that case, are in a great degree pertinent to this case.

We have now gone far enough to deduce the following conclusions:

First. That an action of *assumpsit* for this award could not be maintained against the city for the reason that there is nothing from which such an *assumpsit* could be implied and there is nothing in the statute obligating the city to pay the award or making it a debt upon the city. Plaintiffs' land for the widening of the street was taken by the direct *fiat* of the legislature, and the legislature appointed agents, not of the city, but of the State, to enter upon the lands and make the improvements. In such a case there can be no obligation of the city to pay, except the obligation be found in the statute itself. But for the constitutional inhibition land could be taken for

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But it is further contended on behalf of the plaintiffs that the city is liable because the comptroller did not pay the money realized from the assessments *pro rata* upon all the awards. The answer to this is, that the comptroller, in what he did, did not act as the agent of the city, but as the agent of the State in accomplishing the improvement. The money, when collected, did not belong to the city or form a portion of its funds. It was a special fund to be especially appropriated by the comptroller as required in the law. (*Lorillard v. The Town of Monroe*, 1 Kern. 392.) If the comptroller misappropriated the money or neglected to pay the plaintiffs their share of it, their remedy was against him either by *mandamus* or an action against him adapted to the nature of the case.

It is further contended that the city is liable because the tax officers specified in the statute have not sold the lands assessed, and thus collected \$50,000 of the assessments remaining unpaid. The answer again is that such officers were not the agents of the city, and the city is not responsible in any way for their misfeasance or nonfeasance in this matter. They were appointed to act as agents of the State for the collection of assessments, not to pay a debt of the city, but to pay for the

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land taken by the State. If they have not done their duty they can be compelled to act by *mandamus*, or can be sued for their nonfeasance or misfeasance. A further answer to the contention that the city should be made liable on account of the negligence of the tax officers in not enforcing collection of the assessments is that there is no finding and no proof showing any damage to the plaintiffs on account of such negligence or omission of alleged duty on the part of the tax officers; that is, it does not appear that the assessments could have been collected in any way or by any means. It does not appear that the lands could have been sold so as to realize the amount necessary to pay the plaintiffs, and hence it does not appear that the plaintiffs were damaged by the neglect or omission alleged. On the contrary, it does appear quite clearly that the lands could not have been sold for enough to have paid the expense of the sale; that repeated offers of sale were made at great expense to the city, and no bids could be obtained for the land. Before the city could be made liable on the ground of its negligence to collect these assessments it was requisite that it should appear, and be found that but for such negligence the assessments could have been collected, and that thus the plaintiffs suffered damages from the negligence.

But there is a further answer to the contention that the city should be held liable for the misfeasance or nonfeasance of either the comptroller or the tax officers even upon the assumption that they were charged with duties as agents or officers of the city. It was provided in the city charter (Chap. 63, § 39, Laws of 1862; chap. 863, title 19, § 27, Laws of 1873) as follows: "The city of Brooklyn shall not be liable in damages for any misfeasance or nonfeasance of the common council, or any officer of the city or appointee of the common council of any duty imposed upon them, or any or either of them, by the provisions of this act, or of any other duty enjoined upon them, or any or either of them as officers of the government by any provision of this act, but the remedy of the party or parties aggrieved for any such misfeasance or nonfeasance shall be by *mandamus* or other proceedings, or action to

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compel the performance of the duty, or by other action against the members of the common council, officer or appointee as the rights of such party or parties may by law admit, if at all." This provision in the charter was held to be constitutional in *Gray v. The City of Brooklyn* (2 Abb. Ct. of App. Dec. 267), and it was there said: "The object of the legislature is clear, and that is to exonerate the city from liability on account of the omission and misconduct of its officers, to impose all the legal consequences of their acts directly upon the persons who might be guilty of such official misconduct." Here the sole ground upon which the plaintiffs seek to maintain this action in the argument before us is the omission or neglect of duty on the part of the tax officers of the city to collect the assessment, and also on the ground of the misconduct of the comptroller in not disbursing the moneys collected *pro rata* among all the persons entitled to awards. But the action is thus based necessarily upon the nonfeasance or misfeasance of some one or more of the city officers, and the provision of law quoted is plainly an answer to the action in any aspect in which it may be viewed. Plaintiffs' remedy is confined to *mandamus* or actions against the officers guilty of nonfeasance or misfeasance whoever they may be.

As the city owed the plaintiffs no duty to pay the awards, and was under no obligation directly to pay, its liability, if any, could be based only upon negligence in not discharging a duty which it owed the plaintiffs under the statutes, and they imposed no such duty. The alleged negligence was not a corporate negligence, but was the negligence only of certain officers having specific duties to perform not for the city but for the public, and particularly for the plaintiffs and others, and for the negligence of such officers the provision of law quoted, and the principles of law above referred to furnish an exemption from liability.

It cannot be said that the city ought to have put the officers in motion by *mandamus*, because it was under no liability or obligation to pay the award.

We are not concerned with the question as to the manner in

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which the plaintiffs if defeated in this action are to get payment of their award. It is sufficient for the present purpose that the city is not liable for it in this action. If the act under which the award was made is unconstitutional and invalid for not making suitable provision for compensation, then the plaintiffs have no claim against the city; if constitutional, the methods for procuring payment for the award pointed out in the act must be pursued.

We may say, however, that the plaintiffs cannot be deprived of their land without compensation. The provision to be found in the State and Federal Constitutions which provides that private property shall not be taken for public use without just compensation is their protection against spoliation. In the case where the property is taken by the State or a municipal corporation, the compensation to be made need not be actually ascertained and paid before the property is taken, but it is sufficient that certain and ample provision has been made by law for the compensation of the owner. (*People ex rel. Utley v. Hayden*, 6 Hill, 359; *Cooley on Constitutional Limitations*, 558.) It was doubtless supposed in this case by the legislature that ample and certain provision had been made for the payment of the damages for lands taken for this improvement. It was not anticipated, and perhaps could not have been, that the expense of the improvement would be so great as to amount to a confiscation of the lands upon which assessments were made. It was reasonably certain that a sale of the lands would produce the amount needed to pay the awards. But suppose after the plaintiffs have resorted to all the means furnished by the law to procure compensation for their lands taken, and without any fault on their part they fail, shall they lose their land? I say no! The compensation to be provided, to answer the constitutional requirement, must be certain. It is not sufficient that it is merely formal and illusory, and if in the end the law disappoints the anticipation of the legislature and of the land-owner, and fails to give compensation without any fault of the land-owner, then his land has not been legally taken, and he may re-enter upon his land, or, if needful, bring ejectment for its recovery,

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and he will thus be re-possessioned of his land as of his former estate. In this case, therefore, if after resorting to *mandamus* proceedings and pursuing all the remedies given them by law, the plaintiffs fail, they may re-take their land and that will then be their only remedy.

We, therefore, conclude that this recovery is wrong and that the judgment should be reversed and a new trial granted, costs to abide the event.

The foregoing opinion was written after the first argument of the case in this court. Upon the reargument additional views have been urged upon our attention by the learned counsel for the plaintiffs, which I will briefly notice.

Section 7 of chapter 631 of the Laws of 1868 is as follows: "All laws now in force relative to the widening, opening and improving streets and avenues in the city of Brooklyn, subsequent to the appointment of commissioners of estimate, and proceedings thereon, and the duties of the several persons to be employed therein, substituting the commissioners of Prospect Park in place of the common council, and also in place of the street commissioner of said city, and substituting the said commissioners of estimate and assessment in place of the board of assessors of said city, so far as relates to the opening of streets and avenues, including also payment for the work and the levy and collection of the assessments for such improvements and lien thereof, so far as they are not inconsistent with the provisions of this act, shall apply to and regulate all proceedings that may be had or taken under this act. But such proceedings shall continue to be under the direction of the commissioners of Prospect Park, who shall stand in the place of and act, when required, as the common council of the city or the street commissioner thereof would be required to act in the premises, and they shall employ an attorney and counsel and all such clerks, surveyors and other agents as may be required for the purposes of this act."

The claim is confidently made that this section in some way imposes a duty upon the city to pay this award. It is im-

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possible for me to perceive how it does so. It certainly does not, in terms, impose any duty upon the city. It expressly takes from the common council all authority to act, and substitutes in its place the commissioners of Prospect Park. It is not clear to what precise extent other laws applicable to opening and improving streets in the city of Brooklyn are made applicable to this improvement.

It is claimed that section 16 of title 4 of chapter 384 of the Laws of 1854, which was in force as part of the city charter in 1868 and subsequently, is made applicable. That section is as follows: "The city comptroller shall pay to the persons to whom damages may have been awarded in such report the amount of such damages without any deduction therefrom by way of fee or commission." That section has reference to awards made by commissioners of estimate and assessment for damages to owners of lands taken for street openings. Upon the first argument no stress was placed upon that section and indeed our attention was not called to it. Unless it is sufficient to impose a liability upon the city for the award now in question, there is certainly no other provision of law applicable to the city which does so. The section does not, in terms, impose any obligation upon the city. It does not provide that the city shall be liable for the awards or bound to pay them in its corporate capacity out of its general or corporate funds. To hold that it imposed a general liability upon the city would be against the general scheme provided in the city charter for the payment of the expenses of opening and improving streets. It simply imposes a duty upon the comptroller, and the discharge of that duty is regulated by sections 1, 2 and 3 of title 10 of the same chapter. Section 1 provides that the accounts of the city and the management of its finances shall be under the direction of the comptroller, subject to the provisions of that act, and to the ordinances of the common council. Section 2 provides that the accounts shall be distributed in three distinct classes, the first of which shall embrace all such expenditures as are to be made out of money raised by the general tax and shall be called the

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general fund; the second, such as are to be made out of money raised by a special or local tax, or assessment, and it shall be called the special fund; and the third class shall consist of accounts of the sinking fund; and it is provided that no money raised for the use of one of the funds shall at any time be used for the purposes of either of the other of such funds. Section 3 provides that the accounts of the general fund shall always exhibit the receipts and expenditures of each department of the city government, and no receipt or expenditure of money shall at any time be charged or credited to any other than its appropriate account; that the accounts of the special fund in addition to the general account of such fund shall, at all times, exhibit the amounts received and paid under each item composing such fund, with the amounts received and paid for interest on each; and that the sinking fund account shall exhibit the amounts received into such fund, specifying from what sources they have been received, together with the amount and description of securities belonging to such fund.

If section 16 is made applicable to the Sackett street improvement then also are these sections 1, 2 and 3, and hence no duty was imposed upon the comptroller to pay these awards out of the general fund of the city, but it was his duty to pay and he could pay only out of the special fund created by moneys received from the assessments imposed to pay the awards. If the city could be sued for awards made for land damages, and thus compelled to pay whether the money was in the special fund for that purpose or not, then all these carefully framed provisions would be of no use and could at any time be disregarded and nullified. By section 1 above cited, the common council was authorized to pass ordinances regulating the manner in which the comptroller should discharge his duties, and I find among the ordinances of the city contained in a printed volume delivered to us upon the argument of this case by the counsel for the plaintiffs, which volume is made evidence of the ordinances therein contained (§ 5, tit. 11 of the same chapter), an ordinance (§ 4, art. 4 of the ordinances) which provides that the comptroller shall draw warrants to pay

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awards for land damages when they shall be audited, and "the assessments for the purpose shall be collected and in the treasury."

It is impossible, therefore, to perceive how the plaintiffs can, in this action, enforce payment of their award out of the general fund of the city. Assuming that all the sections referred to are applicable to this improvement, the only way for the plaintiffs to procure payment of their award is to compel the collection of the assessments, and thus the creation of the special fund and then procure payment out of that fund. If through the misfeasance or nonfeasance of any of the city officers the special fund is not created or payment out of it is not made to those entitled, liability to pay awards is not cast upon the city; and for reasons stated in the foregoing opinion, the city cannot be made liable for damages on account of such misfeasance or nonfeasance.

The conclusion I have thus reached is somewhat fortified by other provisions of law applicable to the city of Brooklyn. By section 6 of chapter 213 of the Laws of 1859, it is provided that "in no event shall any expense for any improvement or work contemplated by the first and second sections of this act be a charge against the city of Brooklyn except so far as said city may be the owner of land to be assessed for such work or improvement;" and by section *seven* it is provided that "it shall be a misdemeanor and punishable as such, for any person or officer in the city of Brooklyn to take from the treasury of said city, by warrant or otherwise, any money for or on account of the expense of any local improvement hereafter to be made in said city, unless the same has first been assessed, collected and paid into the treasury to the credit of such improvement." It is claimed on the part of the plaintiffs that these sections have reference only to the improvements specified in the first and second sections of the act, to-wit: regulating, grading and paving streets, etc., and that they have no reference whatever to expenses and payments for land damages. If this claim be well founded, then the whole scheme of the laws constituting the city charter is rendered harmonious, and the city, in its

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corporate capacity, is protected against any liability whatever for the expense of local improvements to be discharged out of its general fund; that is, by the sections cited from the laws of 1854 it is protected against liability for awards made for lands taken for street improvements, and by the sections last cited it is protected against any liability for the expense of regulating, grading and paving the streets. But I am inclined to the opinion that section 7 last cited has reference to every expense for street improvements, as well land damages as other expenses. The word "improvement" there, as well as in many other places in the laws relating to the city, is used to embrace the whole subject of opening, regulating and establishing streets. By other laws, payments for such improvements out of any but the special fund were prohibited, and by this section it is made a crime to make such payments.

Sections 6 and 7 of the act of 1859, above cited, are incorporated in the city charter (Chap. 863 of the Laws of 1873, title 18, § 6), and there it is provided that in no event shall any expense for any street improvement be a charge against the city of Brooklyn; and there the word "improvement" is conceded to embrace the opening of streets as well as the regulating and grading them.

Section 16, above cited, was not new in the charter of 1854, but it is first found, so far as my researches enable me to say, in section 12 of chapter 319 of the Laws of 1833, which was an act to amend the charter of the village of Brooklyn. That section is precisely like section 16 substituting village treasurer in place of city comptroller, and yet it is entirely clear that that section did not impose a corporate liability upon the village to pay the awards out of its general fund, and under it an action of *assumpsit* could not be maintained against the village. (*McCullough v. The Mayor, supra.*) Section 16 is again found substantially embodied in section 27 of title 18 of the charter of 1873. That section is as follows: "The comptroller shall pay to the persons to whom damages may have been awarded in such report the amount of such damages, with interest at the

Dissenting opinion, per EARL, J.

rate of seven per centum per annum from a day thirty days subsequent to the day of confirmation of the respective assessments *pro rata*, as moneys on account of such assessments shall be received from the department of collection." Prior to 1873 as disclosed in the record before us, it had been the custom of the comptroller to pay the awards in the order of their presentation to him, and a controversy had arisen as to whether the awards should be paid in that way or *pro rata* out of the moneys collected from assessments, and the main purpose of the changed phraseology of section 27 obviously was to provide for the *pro rata* payment and not to exempt the city from general liability for awards which before may have been supposed to exist.

I am therefore of opinion, upon a careful review of all the laws applicable to the village and the city of Brooklyn which have come to my attention, that there never has been a time when the village or city was liable in its corporate capacity to pay out of its general fund awards made for lands taken for street improvements. It is clear that it was always the legislative intent that such awards should be paid from benefit assessments.

It is further contended that the city may be held liable in this action to the plaintiffs, because the moneys collected from the assessments were paid into the city treasury; but the words "city treasury" are misleading. They describe nothing tangible. The moneys when collected were required to be paid to the city treasurer and were by him required to be kept separate from the other funds of the city. They were to constitute a special fund applicable only to the payment of the awards. Not only could the comptroller and treasurer not appropriate these funds to any other purpose, but the city through its common council could not use them for any other purpose or control their disposition in any way. The money in the special fund in no sense belonged to the city and constituted no part of its assets. It was created solely for the benefit of the owners of awards, and was subject to the absolute control of the comptroller for the payment of such awards. If he mis-

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appropriated the funds he incurred both a criminal and civil liability, but imposed no liability upon the city.

I recognize the rule that statutes should be so construed, if they can be, as to avoid a conflict with the Constitution, but there is a rule paramount to all others, that in the construction of statutes the intention of the legislature must govern. When that is ascertained it must have effect regardless of consequences. Here the intent of the legislature that the awards for the Sackett street improvement should not be a general charge upon the city is so plain and manifest that it cannot be disregarded or thwarted even if the construction which I have given to the statutes would bring them under the condemnation of the Constitution.

I, therefore, adhere to the views expressed in my prior opinion which may be summarized as follows :

First. There is no provision of law expressly obligating the city to pay this award.

Second. There is no implied obligation resting upon the city to pay it.

Third. The city is not liable for the misfeasance or nonfeasance of any of its officers in consequence of which plaintiffs have failed to receive payment of the award.

Fourth. The money collected from assessments did not come into the possession, control or ownership of the city, so as to make it liable for the payment of this award or for the misappropriation of such money.

All concur with ANDREWS, Ch. J., for affirmance, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

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MARIA L. PLATZ, Respondent, v. THE CITY OF COHOES, Appellant.

Where, through culpable omission of duty upon the part of the municipal corporation, a city street has become obstructed, and in consequence a traveler upon the street is injured, it is no defense to an action against

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the municipality to recover damages that the accident happened upon Sunday, and that the person injured was, in traveling on that day, violating the statute relating to the "observance of Sunday." (1 R. S. 676, § 70.)

The courts may not add to the penalty imposed by that statute a forfeiture of the right to indemnity for an injury resulting from defendant's negligence, and the violation of the statute cannot be regarded as the immediate cause of the injury.

Johnson v. Town of Irasburgh (47 Vt. 28 [19 Am. Rep. 111]), *Holcomb v. Town of Danby* (51 Vt. 428), *Bosworth v. Swansey* (10 Metc. 363), *Jones v. Andover* (10 Allen, 18), disapproved.

(Argued April 19, 1882 ; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 25, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

G. L. Stedman for appellant. The court erred in refusing to nonsuit, upon the ground that the plaintiff met with this accident while violating the Sunday law. (3 R. S. [7th ed.] 1975 ; *Bosworth v. Swansey*, 10 Metc. 363 ; *Jones v. Andover*, 10 Allen, 18 ; *Johnson v. Town of Irasburgh*, 47 Vt. 28 ; *Holcomb v. Village of Danby*, 51 id. 428 ; *McClary v. Lowell*, 44 id. 116 ; *Sutton v. Wauwatosa*, 29 Wis. 21 ; *Merritt v. Earle*, 29 N. Y. 115, 120 ; *Carroll v. Staten Island R. Co.*, 58 id. 126, 133, 135, 137.)

Rufus W. Peckham for respondent. There was no error in refusing to charge that, if the plaintiff was riding in violation of the Sunday law, she could not recover. (*Carroll v. Railway Co.*, 58 N. Y. 126 ; *Merritt v. Earle*, 29 id. 115 ; *Etchberry v. Leville*, 2 Hilt. 40 ; *Wood v. Erie Railway Co.*, 72 N. Y. 196 ; *Winspear v. Ins. Co.*, L. R., 6 Q. B. Div. 42 ; *Lawrence v. Ins. Co.*, 7 id. 216 ; *Reynolds v. Ins. Co.*, 22 L. T. 820 ; 18 Weekly Rep. 1141 ; *Masterson v. R. R. Co.*, 84 N.

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Y. 247, 254; *Baldwin v. Barney*, 12 R. I. 392; *Woodman v. Hubbard*, 25 N. H. 67; *Sutton v. Town, etc.*, 29 Wis. 21; *Mahoney v. Cook*, 26 Penn. St. 342; *Schmidt v. Humphrey*, 48 Iowa, 658; *S. C.*, 30 Am. Rep. 414, 417; *Railroad Co., etc., v. Tow-boat Co.*, 23 How. [U. S.] 209; 20 Alb. L. J. 336; 14 Am. Law Reg. 547, 554.) Traveling on Sunday was not unlawful by the common law. (*Batsford v. Every*, 44 Barb. 618, and note, 620.) The penalty given by the statute can alone be enforced, and a further penalty of submission to wrong without any power or legal right to successfully complain cannot be added to the one provided by statute. (*People v. Hislop*, 77 N. Y. 331.)

DANFORTH, J. The defendant made an excavation in one of its public streets, and neither removing or leveling the earth taken therefrom, left it in the way. While the respondent was riding with her husband, the carriage in which they were was, without carelessness on the part of either, upset by the pile of earth, and she was injured. That the street was defective through the culpable omission of duty on the part of the defendant is not denied, but the accident happened on Sunday, and the learned counsel for the appellant claims that it owed no duty to the plaintiff to keep its streets in repair on that day, because it did not appear that she was then traveling "either from necessity or charity," nor for any purpose permitted by the law. It is plain, therefore, that she was violating the statute relating to the "observance of Sunday" (1 R. S. 628, title 8, chap. 20, art. 8, § 70), but we do not perceive how that fact relieves the defendant.

It imposed an obligation upon the plaintiff to refrain from traveling, and for its violation prescribed a forfeiture of one dollar. It also declares that upon complaint made before a magistrate, and conviction had, that sum might be collected by distress and sale of the goods and chattels of the offender, or if sufficient could not be found, she might be "committed to the common jail for not less than one or more than three days." The statute goes no further, and we are aware of no principle upon which

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it can be held that the right to maintain an action in respect of special damage resulting from the omission of a defendant to perform a public duty is taken away because the person injured was at the time disobeying a positive law. The courts are required to construe a penal statute strictly, and having before him, for judgment, an alleged violation of the Sunday law, Lord MANSFIELD said: "If the act of Parliament gives authority to levy but *one* penalty, there is an end of the question, for there is no penalty at common law." (*Crepps v. Durden*, 2 Cowper, 640.) This was a proceeding to enforce the statute, but in *Carroll v. Staten Island R. R. Co.* (58 N.Y. 126; 17 Am. Rep. 221), an action by a passenger against a carrier to recover damages for injuries received through its carelessness, this court held that the fact, "that the plaintiff was at the time of the injury traveling contrary to the statute," was no defense to the action. The policy of the statute and its limitations were then considered, and the court refused to add to the penalty imposed by it a forfeiture of the right to indemnity for an injury resulting from the defendant's negligence.

The Sunday law received a similar construction in *Phila., Wil. & Balt. R. R. Co. v. Phil. & Havre de Grace Steam Tugboat Co.* (23 How. U. S. Sup. Ct. Rep. 209), the court holding that the offender, the plaintiff in the action, was liable to the fine or penalty imposed thereby, and nothing more, saying, "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of \$7,000, on the libelants, by way of set-off, because their servants may have been subject to a penalty of twenty-shillings each for breach of the statute." To the same effect is *Baldwin v. Barney* (12 R. I. 392; 34 Am. Rep. 670).

It may indeed be said that if the plaintiff had obeyed the law, remained at home, and not traveled, the accident would not have happened. That is not enough. The same obedience to the law would have saved the plaintiffs in the cases just cited. It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant, which it could enforce. But the object of the statute is the

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promotion of public order, and not the advantage of individuals. The traveler is not declared to be a trespasser upon the street, nor was the defendant appointed to close it against her. In such an action the fault which prevents a recovery is one which directly contributes to the accident; as carelessness in driving, either a vicious or unmanageable horse, or at an improper rate of speed, or without observation of the road, or in an insufficient vehicle, or with a defective harness, or in a state of intoxication, or under some other condition of driver, horse or carriage, which may be seen to have brought about the injury.

It may doubtless be said that if the plaintiff had not traveled, she would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or willful act of another. Had the injured party not been present he would not have been hurt. But the act of travel is not one which usually results in injury. It, therefore, cannot be regarded as the immediate cause of the accident, and of such only the law takes notice. At common law the act was not unlawful, and the plaintiff was still under its protection, and may resort to it against a wrong-doer by whose act she was injured. This has been held in many cases where the person injured was at the time doing an act prohibited by the city ordinance or general statute (*Steele v. Burkhardt*, 104 Mass. 59; *Welch v. Wesson*, 6 Gray, 505; *Norris v. Litchfield*, 35 N. H. 271), and even violating the law now in question, or one similar to it. *Carroll v. Staten Island Co.*, and *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Tmboat Co.* have already been referred to. (See, also, *Schmid v. Humphrey*, 48 Iowa, 652; 30 Am. Rep. 414.)

Sutton v. The Town of Wauwatosa (29 Wis. 21; 9 Am. Rep. 534) is in point, not only in its circumstances but in the relations of the parties. The plaintiff was driving his cattle to market on Sunday, and they were injured by the breaking down of a defective bridge which the defendant, through negligence, had failed properly to maintain. The Sunday statute was relied upon, but the town was held liable. In this State a municipal corporation is regarded as a legal entity, and re-

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sponsible for its omission to perform corporate duties, to the same extent as a natural person would be under the same circumstances. (*Dillon on Municipal Corporations*, § 778; *Bailey v. The Mayor*, 3 Hill, 531.) The authorities, therefore, which deny to an individual through whose negligence another has been injured immunity from the consequences of his wrong, because the injured person was violating the law in question, apply here. Many of them are referred to in the cases named above and need not again be cited.

There are, as the counsel for the appellant contends, authorities the other way. Decisions by very eminent and learned courts. In Vermont. (*Johnson v. Town of Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111; *Holcomb v. Town of Danby*, 51 Vt. 428.) In Massachusetts. (*Bosworth v. Swansea*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18.) And immunity is also given by that court, under the same statute, to a railroad corporation through whose negligence the plaintiff was injured. (*Smith v. Boston and Maine R. R.*, 120 Mass. 490; 21 Am. Rep. 538.) But the decisions already made by us (*Merritt v. Earle*, 29 N. Y. 115; *Wood v. Erie Railway Co.*, 72 id. 196; 28 Am. Rep. 125; *Carroll v. Staten Island R. R. Co.*, *supra*) are in the contrary direction, and are sustained, we think, by reasons of justice and public policy. In *Baldwin v. Barney* (*supra*) a question arising under the Sunday laws of Massachusetts came before the court in an action by one injured in that State, while traveling on Sunday, by the reckless driving of one also traveling. On the trial the plaintiff was nonsuited, but on appeal the Massachusetts cases are reviewed and disapproved, and after a very deliberate discussion of the decisions in that and other States the court held that the defendant could not show the illegality of the plaintiff's act as a defense, and the nonsuit was set aside. There will be seen great conflict in decided cases, but the weight of authority seems to favor the conclusion already reached by us. (*Cooley on Torts*, § 157; *Wharton on Negligence*, § 331.)

This result disposes of the appellant's objections, for they all rest on the assumption that as one could not lawfully travel on

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Sunday, there was negligence either of the plaintiff or her husband, and if of the latter, that it was to be imputed to her. It is indeed suggested by the learned counsel for the appellant, that before the accident the husband "had been drinking," and "at the time of the accident was driving a fast horse recklessly." But if it is intended to present this view as ground for reversal it is not tenable, for neither at the close of the plaintiff's case, nor at the end of the testimony when a dismissal of the complaint was asked for, was this subject alluded to. I have, moreover, carefully examined the evidence referred to, and find none which would warrant the defense, or permit a jury to find upon the affirmative of such a proposition. The husband had indeed "drank beer," but the quantity is not stated, nor does it seem to have affected him. Asked by the defendant's counsel, "had you drank any beer on that day?" answers: "Yes, sir." "Who did you drink with?" answers, "Mr. Webber." And as for the rate of speed at which he was driving, he says: "at an ordinary slow jog, just off a walk." and we are referred to no evidence which shows the contrary.

It is not necessary to consider whether, if a different condition had been established, the negligence of the husband in those respects could have been imputed to the wife. The defense relied upon, was the Sunday law, and as it is not available, the judgment appealed from should be affirmed with costs.

All concur, except FINCH, J., taking no part, and TRACY, J., absent.

Judgment affirmed.

CHRISTOPHER R. ROBERT, Executor, etc., Respondent, v. JANE R. CORNING et al., Appellants.

The creation of a trust in real estate does not *ipso facto* suspend the power of alienation, it is only suspended where a trust term is created either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust.

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Where the trustee is empowered to sell without restriction as to time, that being left to his discretion, he to receive, pending the sale, the rents and profits for the benefit of beneficiaries, the power of alienation is not suspended, although a sale be postponed by the non-action of the trustee. The fact that the interest of the beneficiaries is inalienable by statute during the existence of the trust does not suspend the power of alienation.

The statute of perpetuities is pointed only to the power of alienation, not to the time of its actual exercise, and there can be no unlawful perpetuity unless the power of sale is suspended.

The mere fact that it may be the duty of executors, in the exercise of their discretion, to postpone a sale to await a more favorable market, does not constitute such a restraint as suspends the power of alienation within the statute.

So also said statute is not violated by directions as to sales which require the giving of notice or the doing of other preliminary acts, which may involve some delay in the actual conversion.

It seems that if the limitation of the interests in the proceeds is illegal, the power of sale to accomplish that purpose may be void.

The will of R. directed his executors to sell and dispose of his residuary estate ; that portion of the real estate situate in this State to be sold at public sale in the city of New York after three weeks' published notice, the other real estate in such places and manner as the executors should deem best. After directions as to the disposition of the proceeds, there followed this clause : " In view of the present great depression in real estate, it is my will that my executors * * * * exercise their discretion as to the time to sell the same not longer then three years after my decease." The rents, income and profits up to final distribution, the executors were directed to divide semi-annually " among those to whom the bequests are made " in certain proportions. In an action to obtain a judicial construction of the will, *held*, that whether the executors took a trust estate or were simply donees of a trust power, there was no suspension of the power of alienation, as they could, at any time after the testator's death, have conveyed an absolute fee in possession ; that neither the direction as to notice, nor the discretion as to the sale involved a suspension of the power of alienation within the meaning of said statute ; also, that by the will there was an absolute conversion of the real estate into personalty as of the time of the testator's death.

The executors were directed, after disposing of said residuary estate, and deducting from the proceeds expenses and charges, and a legacy given to the testator's wife, to divide the remainder into fifty equal parts, to pay over twelve of such parts to the testator's son C., if then surviving ; in case of his death prior to such distribution, then to his lawful issue. Twenty-eight of said parts were given in similar language to three other children, and the executors were directed to pay the remaining ten shares to an incorporated college. The college was restricted to the use

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of the income of its portion, and in case of its discontinuance, its trustees were directed to apply the fund to certain religious purposes specified. *Held*, that the restriction did not create a perpetuity, and if the provision in case of discontinuance was void, it resulted simply in confirming an absolute title in the corporation.

In case of the death of any child before the testator, the will gave "such legacies, estate, share or proportion of the one so dying unto his, her or their lawful issue, such issue to take the estate or share his, her or their parent would have been entitled to if living." *Held*, that the intent of the testator was to give to his children the absolute title to their respective shares, subject to a limitation over in case of death before distribution, and that the ultimate vesting could in no event be postponed longer than the life of the parent.

The will directed that all charges appearing on the testator's books of account against any of the said legatees should be considered as part of his residuary estate, and the executors were directed to deduct the amount from the share of said legatee. *Held* valid.

(Argued April 20, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made December 18, 1880, which affirmed a judgment, entered upon a decision of the court on trial at Special Term. (Reported below, 23 Hun, 299.)

This action was brought by plaintiff, as executor of the will of Christopher R. Robert, deceased, to obtain a judicial construction of said will, and a decision as to the validity of certain provisions thereof.

The will, after various specific devises and bequests, among them a bequest to the testator's wife of \$30,000, contained these clauses :

"*Fourthly*. All the rest, residue and remainder of my estate, real and personal, whatsoever or wheresoever, as well that I now have as that which I may hereafter acquire and die possessed of or entitled to (except such as is herein otherwise disposed of), I order and direct my executors hereinafter named, or such of them as shall qualify and act, the survivors and survivor of them, to sell and dispose of as follows, namely: such portion of the said real estate as may be in the State of New York to be sold at public sale in the city of New York, notice

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thereof having first been given of the time and place of sale for three successive weeks in four of the daily newspapers of the said city, giving a full proper description of the said real estate; and the real estate in other places to be sold at such places and in such manner as my said executors deem best, and after disposing of my said real and personal property and deducting from the proceeds thereof all necessary expenses and charges, also the thirty thousand dollars bequeathed my wife as before mentioned, to divide the remainder into fifty equal parts; and if my son, Christopher R. Robert, junior, be then surviving, to pay over to him twelve equal parts thereof, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my son Frederick Robert be living at the time of such distribution to pay over to him eleven of said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said eleven parts to his lawful issue in equal portions, share and share alike.

“And if my son Howell W. Robert be living at the time of such distribution to pay over to him twelve of the said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my daughter Jane R. Corning be living at the time of such distribution to pay over to her five of the said equal parts, but, in case of her death prior to such distribution, upon such distribution to pay over the said five parts to her lawful issue in equal portions, share and share alike.

“And upon such division to pay over to ‘The trustees of Robert College of Constantinople’ ten of such equal shares, which, with the other bequests herein made to the said trustees of said college, are for the endowment fund of the said college, and the money derived from the said bequests is to be invested in bond and mortgage on improved productive real property in fee-simple, in the city of New York or Brooklyn, worth double the amount loaned at a low valuation, — the income

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only to be used for the general uses and purposes of the said college.

“In case the said college shall be discontinued, then I will that the said bequests, as well as any other bequests herein made to the said college, shall be applied by the said trustees of said college in such manner as they may deem best for the general purposes of Evangelical and Protestant education among any of the nationalities of the Turkish empire.

“*Fifthly*. If either of my said children shall die before me, leaving lawful issue, then I give, devise and bequeath such legacies, estate, share or proportion of the one so dying unto his, her or their lawful issue; such issue to take the estate or share his, her, or their parent would have been entitled to if living.

“*Item*. If either of my said children should die before me without leaving lawful issue, then I give, devise and bequeath the estate, legacies, share and proportion of my estate hereby given to the one so dying unto the survivors or survivor of them, my said children and the issue of such of them as shall have previously died leaving lawful issue, such issue to take the part or share his, her or their parent would have been entitled to if living.

“*Sixthly*. All moneys or indebtedness which shall appear upon any inventory, or ledger, or books of account kept by me or under my direction, charged as due to me from any or either of my said children or Robert College of Constantinople, during my life-time, and as an outstanding or unsettled account at the time of my decease, whether with or without security, shall be considered as forming part of my estate mentioned or referred to in the fourth article of this my will, and a discharge from such indebtedness by my executors shall be deemed and taken as an equivalent to an equal amount paid such college, child or children, on account of its, his, her or their share and portion under this my will.

“And my executors are hereby directed to deduct the amount of such indebtedness from such respective share or portion, but no interest is to be charged upon or added to any such indebt-

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edness except in case a bond, note, or other obligation securing such indebtedness be found among my assets, upon which said bond, note or obligation interest has been paid or charged, in which case the said indebtedness shall continue to be charged with interest."

Ch. Francis Stone for appellant Jane R. Corning. All the dispositions of the residuary estate are void for remoteness. (*Harris v. Clark*, 7 N. Y. 261; 1 R. S. 729, § 56; *Knox v. Jones*, 47 N. Y. 396; *Tobias v. Ketchum*, 32 id. 329; *Vernon v. Vernon*, 53 id. 351; *Moss v. Moss*, 85 id. 60; *Hawley v. James*, 16 Wend. 175; 1 R. S. 730, § 63; id. 735, § 103.) The future estates in the residue given to children and their issue are inalienable until the distribution, because, whether the parents or their issue shall take, must remain uncertain during the trust term. (*Knight v. Knight*, 2 Sim. & Stu. 490; *Craig v. Leslie*, 3 Wheat. 586; *Hetzel v. Barber*, 59 N. Y. 11; *Garvey v. McDavitt*, 72 id. 562; *Trower v. Knightly*, 6 Madd. 134; *Striker v. Mott*, 28 N. Y. 92, 93; 1 R. S. 724, § 25; 3 id. [2d ed.] 573, Rev. Notes; *Doe v. Scudamore*, 2 Bos. & Pul. 289; 16 Wend. 238; 20 id. 566, 567; *Hawley v. James*, 16 id. 136.) There are no persons in being who can convey a fee-simple absolute in possession before the distribution. (*Goldschmid v. Goldschmid*, 1 T. & R. 454, Poste Note B.) All the limitations of the will in respect to the testator's residuary personal property are void in law. (1 R. S. 773, § 2; id. 730, § 63; id. 773, § 1; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 id. 9; *Manice v. Manice*, 43 id. 382.) The reserved power to alter a part of the will by proxy, and by unattested entries of indebtedness is contrary to the statute. (2 R. S. [1st ed.] 64, § 42; *Langdon v. Astor*, 16 N. Y. 26; 1 Redfield on Wills, 278, § 22, subd. 13; *Thayer v. Wellington*, 9 Allen, 283; *Habergham v. Vincent*, 2 Vesey, Jr., 228; 3 Duer, 582-4.) The Tennessee lands cannot be taken by the college under any power granted by this State. (*Thompson v. Quimby*, 2 Bradf. 459.)

John Clinton Gray for appellant Frederick Robert. Authority to sell coupled with provisions for payment of rents

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and profits to another creates a trust estate in the executor. (*Vernon v. Vernon*, 52 N. Y. 351; *Tobias v. Ketcham*, 32 id. 319, 328; *Brewster v. Striker*, 2 Comst. 19; *Smith v. Schultz*, 68 N. Y. 41; *Garvey v. McDevitt*, 72 id. 562; *Morse v. Morse*, N. Y. Ct. of App., April 19, 1881; 2 Comst. 297; 2 W. Saunders' 11; R. S., part 2, chap. 1, tit. 2, art. 1, § 55.) An illegal suspension of the power of alienation existed. (R. S., art. 1, tit. 2, §§ 14, 15; *Haroley v. James*, 16 Wend. 134, 171, 172; *Hone's Executors v. Van Schaick*, 20 Wend. 566; *Thompson v. Carmichael's Executors*, 1 Sandf. Ch. 387; *Schettler v. Smith*, 41 N. Y. 328, 334; Lewis on Perpetuities, 170; *Moore v. Moore*, 47 Barb. 257; *Ibbettson v. Ibbettson*, 10 Sim. 495.) The absolute ownership and power of alienation of the estate are suspended by the creation of a future estate where the persons in whom it will ultimately vest cannot be known; and as the persons in whom it will vest may not be in existence, no person can convey an absolute fee. (*Leonard v. Burr*, 18 N. Y. 107; 1 R. S. 728, § 55; 730, §§ 63, 65; *Haroley v. James*, 15 Wend. 61; *Hone's Executors v. Van Schaick*, 20 Wend. 564.) The beneficiaries cannot alienate their interests in a trust. (2 R. S. [Banks' 6th ed.] 1110, § 76 [63].) Nor can the power of sale be waived by all the legatees, and if not by all, then the sale must take place if the provision is valid. (*Trower v. Kingsley*, 6 Mad. 134; *Garvey v. McDevitt*, 72 N. Y. 562; *Hetzel v. Barbour*, 69 id. 1; *Jennings v. Jennings*, 7 id. 547; *Brewer v. Brewer*, 11 Hun, 147; 72 N. Y. 603.) If the trust estate attempted to be created is illegal, then the provision as to the residuary estate fails as an entirety, and the estate descends to the heirs at law. (*Chapman v. Brown*, 3 Barb. 634; *Lovelace v. Blight*, Cowp. 355; *Chrystie v. Phylfe*, 19 N. Y. 344; *Post v. Hover*, 33 id. 593.) To entitle the trustees of Robert College to take any part of this estate, they must bring themselves within the protection of the statute, and it must appear that some real or personal estate is given to them in a mode, and of a description which the law authorizes. (2 R. S. [Banks' 6th ed.] 440; *Downing v. Marshall*, 23 N. Y. 366, 388; *Incorporated Church Build-*

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ing Society v. Coles, DeG., M. & G. 324; *Brook v. Badley*, L. R., Ch. App. 672.) The sixth clause is invalid, because the testator attempts virtually to incorporate into the will various kinds of existing, but unattached papers and books, whose contents either must have been unknown to any one but the testator, or might perhaps not have been known to him. (*Langdon v. Astor*, 16 N. Y. 26; *Thompson v. Quimby*, 2 Bradf. 49; *Thayer v. Wellington*, 9 Allen, 291; *Habergham v. Vincent*, 2 Ves. Jr. 228; 3 R. S. [Banks' 6th ed.] 63, § 40 [42].)

A. J. Vanderpoel for plaintiff, respondent. The provisions of the will did not create a trust estate in the executors. (*Post v. Hover*, 33 N. Y. 593, 599; *Heermans v. Robertson*, 64 id. 332; 2 R. S. 1109, §§ 69, 71, 72.) The division of the estate was merely a mechanical act, supposed to take place as soon as sale could be made. The interests were all vested. (*Clason v. Clason*, 18 Wend. 369; *Manice v. Manice*, 43 N. Y. 303.) If the ninth clause contains a direction to accumulate each share until each child attains twenty-five years of age, it is only invalid for the period over twenty-one years. (2 R. S. [6th ed.] 1104, § 38; 1 R. S. 774, orig. p.; *Williams v. Williams*, 4 Seld. 825.) Even if the devise and bequest to Robert College, or any other of the special bequests or provisions are invalid, the rest of the will is not disturbed. (*Knox v. Jones*, 47 N. Y. 390; *Adams v. Perry*, 43 id. 501; *Manice v. Manice*, id. 303; *Williams v. Conrad*, 30 Barb. 524; *DeKay v. Irving*, 5 Den. 646; *Post v. Hover*, 33 N. Y. 593; *Harrison v. Harrison*, 36 id. 543; *Savage v. Burnham*, 17 id. 561.)

Thomas G. Shearman for the trustees of Robert College, respondents. There being no express devise of the testator's real property, if the residuary clause stood alone the title to the real property would vest in the heirs, subject to the exercise of the executors' power of sale. (*Moncrief v. Ross*, 50 N. Y. 431, 435; *Heermans v. Robertson*, 64 id. 332, 346; *Hutchings v.*

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Baldwin, 7 Bosw. 236; *re McLaughlin*, 2 Bradf. 107; *Catton v. Taylor*, 42 Barb. 578; *Vernon v. Vernon*, 53 N. Y. 351; *Knox v. Jones*, 47 id. 346; *Hone v. Van Schaick*, 20 Wend. 564; *Tobias v. Ketchum*, 23 N. Y. 319; *Brewster v. Striker*, 2 id. 19; *Morse v. Morse*, 85 id. 53.) The executors took no title to the real estate, but held only a power in trust. (*Prentice v. Janssen*, 79 N. Y. 478; affirming *S. C.*, 14 Hun, 548; *Manice v. Manice*, 43 id. 303, 364; *DeKay v. Irving*, 5 Den. 649, 654; *Post v. Hover*, 33 N. Y. 593, 599, 601; *Martin v. Martin*, 43 Barb. 172; see, also, *Jennings v. Conboy*, 73 N. Y. 230, 236; *Manice v. Manice*, 43 id. 303, 362; *Tucker v. Tucker*, 5 id. 408.) The trust estate created by the will, if void as a trust, may be valid as a power. (*Downing v. Marshall*, 23 N. Y. 366; *Manice v. Manice*, 43 id. 303, 304; *Crittenden v. Fairchild*, 41 id. 289, 292; *New York Dry Dock Co. v. Stillman*, 30 id. 178, 193; *DeKay v. Irving*, 5 Den. 649; 1 R. S. 729, § 58.) The discretion given the executors to delay the sale of the real estate for three years was not a suspension of the power of alienation for an unlawful period. (*Van Vechten v. Van Veghten*, 8 Paige, 104, 124; *Roper's Trusts*, 11 Ch. Div. 272; *Davey v. Ward*, 7 id. 754; *Mortimer v. Watts*, 14 Beav. 616; *Webb v. Shaftesbury*, 7 Ves. 480; *Walker v. Shore*, 19 id. 387, 391; *Ireland v. Ireland*, 84 N. Y. 321; *Beaufort v. Berty*, 1 P. Wms. 703; see *Manice v. Manice*, 43 N. Y. 303, 365; *Heermans v. Robertson*, 64 id. 332, 339; affirming 5 T. & C. 596.) The objection to the clause requiring three weeks' notice of sale was well taken. (2 R. S. 109, § 74; 1 id. 532, §§ 34, 35; 2 id. 368, § 94; Code Civ. Pro., § 1434; 2 R. S. 104, § 25; Code of Civ. Pro., §§ 2772, 1434.) If the requirement of three weeks' notice of sale could possibly be held to work an unlawful suspension of alienation, it could be disregarded by the executors. (*Minuse v. Cox*, 5 Johns. Ch. 441, 447.) The power of alienation is not suspended within the meaning of the statute, so long as there is any number of persons in being by whose concurrent consent a good title could be conveyed. (1 R. S. 723, § 14; *Everitt*

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v. *Everitt*, 29 N. Y. 39, 96; *Gott v. Cook*, 7 Paige, 521, 543; *Greenleaf v. Queen*, 1 Pet. 138; *Hetzell v. Barber*, 69 N. Y. 1, 11; *Craig v. Leslie*, 3 Wheat. 577; *Smith v. Starr*, 3 Whart. 62, 65; *Burr v. Line*, 1 id. 252, 265; *Stuck v. Mackey*, 4 W. & S. 196; *Mandelbaum v. McDonnell*, 29 Mich. 78; *Seely v. Jago*, 1 P. Wms. 389; *Crabtree v. Bramble*, 3 Atk. 680; 1 Story's Eq. Jur., § 793; 43 N. Y. 303, 388; *Post v. Hover*, 33 id. 593; *Minuse v. Cox*, 5 Johns. Ch. 441, 447.) The discretion of a trustee can be controlled by the court, and will be so controlled when necessary to avoid the frustration of the testator's intention. (*Heermans v. Robertson*, 64 N. Y. 332, 339; *Walker v. Short*, 19 Vesey, 387; *Hawkins v. Chappel*, 1 Ark. 621; *Manice v. Manice*, 43 N. Y. 303, 368, 369; *DeKay v. Irving*, 5 Denio, 649; *Minors v. Battisson*, 1 App. Cas. 428; *Martin v. Martin*, L. R., 2 Eq. 404; *Birds v. Ackey*, 24 Beav. 615; *Clason v. Clason*, 18 Wend. 369; *Oxley v. Lane*, 35 N. Y. 340, 349; *Savage v. Burnham*, 17 id. 561, 576.) A bequest to any benevolent or religious corporation, with the direction that the income only shall be used for the purposes of the corporation, is perfectly valid. (*Wetmore v. Parker*, 52 N. Y. 450; *Williams v. Williams*, 8 id. 525; 43 id. 387.) The objection that the devise of real estate in Tennessee to the trustees of Robert College is void, and in the absence of local statutes authorizing the corporation to take can only be raised by proof that the trustees of Robert College, are not authorized to take under the Tennessee law. (*Knox v. Jones*, 47 N. Y. 389, 395.) The provision of the will directing legatees to be charged with moneys or indebtedness, appearing by the testator's books to be due him from them, has no effect adverse to the will. (*Langdon v. Astor*, 16 N. Y. 9, 25, 31; *Gilman v. Gilman*, 6 N. Y. Sup. Ct. 211; affirmed, 63 N. Y. 41; *Lawrence v. Lindsay*, 68 id. 108; *Marsh v. Brown*, 18 Hun, 319; *Thompson v. Quimby*, 2 Bradf. 449, 459. See *Manice v. Manice*, 43 N. Y. 303, 384; *Oxley v. Lane*, 35 id. 340, 348; *DeKay v. Irving*, 5 Denio, 649; *Jennings v. Conboy*, 73 N. Y. 230, 236; *Manice v. Manice*, 43 id. 303, 362; *DuBois v.*

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Ray, 35 id. 162; *Post v. Hover*, 33 id. 593; *Bates v. Hillman*, 43 Barb. 645.)

ANDREWS, Ch. J. By section 15, of the article of the Revised Statutes relating to the creation and division of estates in land (1 R. S. 723), the absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period, than during the continuance of two lives, in being at the creation of the estate, except in a single case, not material to the present inquiry. What shall constitute such suspension is declared in section 14. Such power of alienation (the section declares), is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed. The rule declared in this section, constitutes, under our statute, the sole test of an unlawful perpetuity. Construing sections 14, and 15, together, it is manifest, that where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute fee in possession, there is no suspension of the power of alienation, and no question under the statute of perpetuities arises. But the statute does not prohibit all limitations of estates, suspending the power of alienation. It permits them, within the restriction of two designated lives in being at their creation, and a minority. If the suspension of alienation is effected by the creation of future contingent estates, the validity of the limitation depends upon the question, whether the contingency upon which the estates depend, must happen within the prescribed period. If the suspension is effected by the creation of an express trust to receive the rents and profits of land, under section 55 of the statute of uses and trusts (1 R. S. 728), the lawfulness of the suspension, depends upon the question, whether the trust term is, in respect of duration, lawfully constituted. But the mere creation of a trust, does not, *ipso facto*, suspend the power of alienation. It is only suspended by such a trust, where a trust-term is created, either expressly or by implication, during the existence of which, a sale by the trustee, would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not sus-

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pended, although the alienation in fact may be postponed, by the non-action of the trustee, or, in consequence of a discretion reposed in him, by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the *power* of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason, that the trustees are persons in being, who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the statute of perpetuities, is, whether the trusts in respect to the converted fund, are legal or operate to suspend the absolute ownership of the fund, beyond the period allowed by law. If the limitation of the interests in the proceeds, is illegal, the consequence might follow, that the power of sale given to accomplish the illegal purposes, would be void. (*Van Vechten v. Van Veghten*, 8 Paige, 124.)

It is strenuously insisted by the counsel for the respondent, that the testator intended the will in question to vest the legal title to his residuary real estate in the executors, and that this is the legal effect of the power of sale conferred by the fourth section, in connection with the clause in the eighth section, whereby he directs his executors to divide all the "rents, income or profits from any estate until it is finally distributed semi-annually among those to whom the bequests are made, in the proportion that the amount of the said bequest bears to the said net income or profit." There is no express devise to the executors of the legal estate; but the direction that they shall semi-annually divide the net income and profits, until the final distribution among the several distributees carries with it, by natural implication, an authority to receive the rents, income and profits meanwhile, to enable the executors to perform the duty of dividing them among the several beneficiaries. The testator contemplated that the real estate might not

be sold for some time after his death, for by the first clause in the eighth section, he authorizes the executors "in view of the present great depression in real estate," to postpone the sale in their discretion, but for a period not longer than three years after his decease. The presence of the legal estate in the trustees pending a sale, if not absolutely necessary to enable them to perform the duty imposed upon them, to divide the net income and profits, is a convenient and natural arrangement, and the vesting of the legal estate in the trustees by implication, would not, as we construe the will, defeat or disturb any of its provisions, but would be in harmony with its scheme and dispositions. The general rule, that to constitute a devise of an estate by implication, the intention must be clear, is well settled. (Jarman on Wills, 465.) The rule has especial application, and is most stringently applied, where a beneficial devise by implication is claimed, which would divest the title of the heir if the claim should be admitted. This rule has also been frequently applied in cases involving questions under our statute of uses and trusts, where a trust estate, if held to result from the language and dispositions of a will, would render it illegal and void. In such cases the courts, for the purpose of sustaining the will, construe an authority and duty conferred or imposed upon executors, where it is possible to do so, as a mere power in the trust, although the duty imposed, or the authority conferred, may require that the executors shall have control, possession, and actual management of the estate. (*Downing v. Marshall*, 23 N. Y. 366; *Post v. Hover*, 33 id. 593; *Tucker v. Tucker*, 5 id. 408.) But there are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain the dispositions of the will. (*Craig v. Craig*, 3 Barb. Ch. 76; *Bradley v. Amidon*, 10 Paige, 235; *Tobias v. Ketchum*, 32 N. Y. 329; *Vernon v. Vernon*, 53 id. 351;

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Morse v. Morse, 85 id. 53. See, also, *Brewster v. Striker*, 2 id. 19.)

But it is unnecessary to determine whether the executors took under the will in question, the legal title to the real estate, for in the view we take of the will, there was no suspension of the power of alienation, whether the executors took a trust estate, or were simply donees of a trust power. In either character, whether as trustees or as executors only, they could at any time from the moment of the testator's death, have conveyed an absolute fee in possession. The suspension of the power of alienation of the real estate is supposed to result from the direction of the fourth section of the will, that the sale of the testator's real estate, situate in the State of New York, should be made by the executors at public sale in the city of New York, after three weeks' notice by publication in four daily newspapers of the city, and also from the provision in the eighth section that "in view of the present great depression in real estate," the executors might exercise a discretion as to the time of sale not longer than three years after the testator's death. The direction that the real estate in this State, should be sold at public sale, on three weeks' notice, was a prudential arrangement to insure a fair sale, and prevent a sacrifice of the property, and in no proper sense suspended the power of alienation. The direction for notice was a mere incident to the conversion of the property, and the requirement was both usual and reasonable. The statute of perpetuities is not violated by directions which may involve some delay in the actual conversion or division of property, arising from the necessity of giving notice, or doing other preliminary acts. (*Manice v. Manice*, 43 N. Y. 303.) Such delays are not within the reason or policy of the statute. The statute was aimed against the creation of inalienable trust estates, or contingent limitations, postponing the vesting of titles beyond the prescribed period. The act of 1837 (Chap. 460, § 43), provides that sales of real estate made by executors in pursuance of an authority given by any last will, unless otherwise directed therein, may

be public or private. A public sale implies prior notice. The direction that the sale should be public was clearly valid, and it can make no difference upon the point now in question, whether the length of the notice (if reasonable) is prescribed by the testator or is left to the judgment of the executors.

We are also of the opinion that the discretion vested in the executors to delay the sale of the real estate not exceeding three years, did not create a trust term for any period of time and involved no suspension of the power of alienation. The discretion, as the testator declares, was given in view of the depression in real estate. In the absence of any provision in the will, the executors would have a reasonable discretion as to the time of sale, to be exercised in view of all the circumstances. The *power* of sale was not fettered by the discretion given by the will. The executors could sell and convey the land at any time, by a perfect title. It may be conceded that they were bound to exercise their discretion in good faith, and to delay the sale if the interests of the beneficiaries seemed to require it. But there can be no unlawful perpetuity unless the *power* of sale is suspended, and the mere fact that it might be the duty of the executors, in the exercise of their discretion, to postpone the sale to await a more favorable market, does not, we think, constitute such a restraint as suspends the power of alienation within the statute.

The remaining question on this branch of the case relates to the limitation of interests in the proceeds of the sale to be made by the executors. There was, by the will, an absolute conversion of the real estate into personalty, as of the time of the testator's death, and the several distributees took their interests as money and not as land. (*Kane v. Gott*, 24 Wend. 641; *Stagg v. Jackson*, 1 N. Y. 206.) Were these interests so limited as to vest the absolute ownership within or at the expiration of not more than two lives in being at the death of the testator? (1 R. S. 773.) The executors, in the fourth section of the will, are directed, after selling the real and personal property, and deducting expenses and charges and \$30,000 for the testator's wife, to divide

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the remainder into fifty equal parts, "and if my son Christopher R. Robert, junior, be then surviving, to pay over to him twelve equal parts thereof, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike." The testator, in similar language, gives to his son Frederick, eleven shares, to his son Howell, twelve shares, and to his daughter Jane R. Corning, five shares, and the executors are directed, on the division, to pay the remaining ten shares to "the trustees of Robert College of Constantinople." We are of opinion that the legacies to the sons and daughter of the testator, and to Robert College, vested in the respective legatees immediately on the death of the testator. It is true that there is in the fifth section of the will, no gift to the several legatees, except the gift implied in the direction to the executors upon the distribution, to pay over the shares respectively, and by a general rule of construction, where there is no direct gift, and words of condition such as *if* or *upon* are used, in connection with a direction for payment at a future time, the time is regarded as of the substance of the gift, and the legacy is contingent and not vested. But the question is generally one of intention, and the whole will is to be considered in determining the intention of the testator. The intention of the testator in respect to the shares of the sons and daughter, appears to have been to give them the absolute title to their respective shares, subject to a limitation over to their issue, in case of their death before the period of distribution. The postponement of the distribution, which was contemplated, was for the convenience of the estate to enable the executors advantageously to convert the property, and the rents, income and profits which might accrue between the time of the testator's death and the time of distribution were given to the several legatees to be paid semi-annually, in proportion to their interests in the *corpus* of the fund. These circumstances are regarded as rebutting the presumption against the vesting of legacies, arising from the fact that there is no direct gift, but only a direction to pay over at a future time. The postpone-

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ment of the payment, where it is made for the convenience of the estate, is consistent with the vesting of the legacies, and the gift of the intermediate income, indicates an intention to vest the *corpus* from which the income is to be derived. (*Packham v. Gregory*, 4 Hare, 396; *Hanson v. Graham*, 6 Ves. 239; *Davies v. Fisher*, 5 Beav. 201; 1 Jar. 843; 1 Rop. on Leg. 573; 2 Wms. on Exrs. 1243.) It is also to be observed that in the fifth section of the will, which provides for the contingency of the death of a child without issue, before the death of the testator, the testator designates the interest which is to go to the survivors, as "the share or proportion of my estate hereby given to the one so dying." The limitation over to the issue of any child dying before the distribution, was the limitation of a future contingent estate to such issue, but the ultimate vesting of the several legacies given primarily to the sons and daughter, could in no event be postponed longer than the life of the parent. On the death of any son or daughter before distribution, leaving issue, the share of the one so dying would immediately vest in such issue, and if there was no issue, it would go to his or her next of kin. (See *Norris v. Beye*, 13 N. Y. 273; *Trustees, etc., v. Kellogg*, 16 id. 83.) The legacy to Robert College was also vested, and we perceive no ground upon which its validity can be questioned. It is not claimed that the corporation was not capable of taking the legacy, and the fact that the testator restricted the college to the use of the income was consistent with the purpose of donations to such corporations, and did not create a perpetuity. (*Wetmore v. Parker*, 52 N. Y. 450.) The provision that if the college should be discontinued, the trustees should apply the fund for purposes of Evangelical and Protestant education among the nationalities of the Turkish empire, if held to be void as a limitation over for the benefit of unascertained beneficiaries, or for other reason, would simply result in confirming an absolute title to the fund in the corporation.

We think the sixth section of the will is valid, within the rule that a testator may direct that the amount of a legacy once

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completely fixed by the will itself, shall be diminished by events actually occurring as matters of fact, but not by an unattested testamentary writing, disconnected from any actual occurrence. (*Langdon v. Astor*, 16 N. Y. 26.) The sixth section was, we think, intended to provide simply, that any actual indebtedness found charged concurrently therewith on the testator's books of account, should go in diminution of the payments to the several legatees as a part of their shares respectively.

These views lead to an affirmance of the judgment.

All concur, except TRACY, J., absent.

Judgment affirmed.

WILLIAM SCHULTZ, by Guardian, etc., Respondent, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

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Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon the trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized. *Held* untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. (Code of Civil Procedure, § 722.)

Also *held*, that defendant was liable for the act of the conductor in throwing plaintiff from the car.

The evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and another witness for defendant that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with

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P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order so as to fix the company with liability in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded. *Held* error.

It is competent for a party against whom a witness has been called to prove acts or declarations of his, showing feelings of hostility or malice on his part toward such party. If upon cross-examination he denies such facts, they may be proved by other witnesses, as the inquiry into his state of feeling toward the party is not collateral.

It seems, however, that the evidence to show hostile feelings of a witness should be direct and positive and not very remote.

Schultz v. Third Ave. R. R. Co. (14 J. & S. 211), reversed.

(Argued April 24, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 12, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 14 J. & S. 211.)

The nature of the action and the material facts are stated in the opinion.

Samuel Hand for appellant. The court erred in excluding defendant's offer to prove by Plass, another car-driver, that plaintiff's witness Reilly had a conversation with him in which Reilly asked him to testify falsely in another case that his brakes were out of order, so as to make defendant liable, the evidence offered being material, relevant and not collateral. (*Starks v. The People*, 5 Den. 106; *Newton v. Harris*, 6 N. Y. 346; *Long v. Lamb*, 9 Cush. 365; *Drew v. Wood*, 26 N. H. 363; *Yerwin Case*, 6 Camp. 639; *Starr v. Cragin*, 24 Hun, 178; *Gale v. N. Y. Cent. & H. R. R. Co.*, 76 N. Y. 594, 595; *Hutchinson v. Wheeler*, 35 Vt. 340; *Collins v. Stephenson*, 8 Gray, 441; *Atwood v. Welton*, 7 Conn. 71; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 91; *Moore v. The People*, 53 N. Y. 639.) The court erred in denying the motion to dismiss the complaint on the ground that, from the evidence, the act which produced the injury complained of is shown to be a willful, reckless and malicious act by a servant of the defendant, beyond any authority, express or implied,

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conferred upon him by the defendant, and also upon the ground that, conceding the car to have been out of order, or the brake defective, that as a cause of injury or action it is too remote to maintain the suit. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129; *Bayley v. The Manchester & L. Railway Co.*, 8 Law. Reporter, 1872-73; *E. Co. R'way Co. v. Broom*, 2 Exch. 326; *Higgins v. Waterliet R. Co.*, 46 N. Y. 23; *Jackson v. Second Ave. R. R.*, 47 id. 274; *Cohen v. D. D. B. E. & B. R. R. Co.*, 69 id. 176; *Sanford v. Eighth Ave. R. R. Co.*, 23 id. 347; *Shea v. Sixth Ave. R. R. Co.*, 62 id. 185; *Isaacs v. Third Ave. R. R. Co.*, 47 id. 129; *Wright v. Wilcox*, 19 Wend. 346; *Vanderbilt v. The Richmond Turnpike Co.*, 2 Comst. 482; *Mali v. Lord*, 39 N. Y. 385; *Fraser v. Freeman*, 43 id. 566; *McManus v. Crickett*, 1 East, 107; *Cox et al. v. Kealey*, 34 Ala. 344; *Little M. Co. v. Wetmore*, 9 Am. Law Reg. 621; *Eastern R. R. Co. v. Broom*, 6 Exch. 326; *Roe v. The Bierkenhead L. & C. J. Railway Co.*, 7 Eng. Law and Equity, 547; *Bayley v. The Manchester & L. Railway Co.*, 8 L. R. 1872-3; Story on Agency, § 456 [6th ed.]; Kent's Com. 259, citing *McManus v. Crickett*, *supra*, and *Parker v. The Essex Bank*, 17 Mass. 508, 510; Inst. Lib. 4, tit. 5, § 1; 1 Dig. Lib. 9, tit. 3; Pothier Pand. Lib. 4, tit. 9, u. 1, 2, 8; 1 Domat, B. 1, tit. 16, § 1; Lord Staire's Inst. B. 1, tit. 3, § 3; 1 Black. Com. 432.) The verdict of \$15,000 was erroneous, as plaintiff could not under his complaint recover more than \$10,000. (Sedgwick on The Measure of Damages [5th ed.], 1869, 685, 686; *McIntire v. Clark et al.*, 7 Wend. 330; *Bowman v. Earle*, 3 Duer, 695; *Corning v. Corning*, 2 Seld. 99; *Custer v. Lawrence*, 17 Johns. 111; *Dey v. Dey*, 3 Wend. 356; *Moffet v. Sackett*, 18 N. Y. 422; *Casson v. Delany*, 38 id. 180; *Dunslow v. Hooke*, 3 Wilson, 185; *Livingston v. Rogers*, 1 Comst. 587; *Peak v. Oldham*, Cowp. 276; *Roberts v. Leslie*, 9 N. Y. Week. Dig. 405.)

Nathaniel C. Moak for respondent. The motions to dismiss the complaint on the ground that the evidence showed

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that the act which produced the injury complained of was the willful, reckless and malicious act of the servant of the defendant beyond any authority conferred upon him by the defendant were properly denied. (*Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 275; *Rounds v. Del. Co. R. R.*, 64 id. 137; *Day v. Brooklyn*, 12 Hun, 435; affirmed, 76 N. Y. 593; *Ochsenbein v. Shapley*, 12 N. Y. Weekly Dig. 316; Ct. App., 85 N. Y. 219-223.) As in performing what appeared to be his duty to his employers, the conductor ejected the plaintiff from the car; whether it was a mistake of judgment on the part of the conductor or not, the defendant is liable for the manner in which he acted, and for the consequences of his acts. (*Hoffman v. N. Y. C. R. R.*, 13 Weekly Dig. 313; *Higgins v. Waterliet Turnpike Co.*, 46 N. Y. 26; *Jackson v. Second Ave. R. R. Co.*, 47 id. 276; *Hamilton v. Third Ave. R. R. Co.*, 53 id. 25; *Shea v. Sixth Ave. R. R. Co.*, 62 id. 183; *Round v. Delaware R. R. Co.*, 54 id. 136; *Cohen v. Dry Dock R. R. Co.*, 69 id. 174; *Peck v. N. Y. C. R. R. Co.*, 70 id. 591; *Mott v. Consumers' Ice Co.*, 73 id. 543; *Day v. Brooklyn*, 12 Hun, 435; affirmed, 76 N. Y. 593; *Ochsenbein v. Shapley*, 12 N. Y. Weekly Dig. 316; Ct. App., 85 N. Y. 214.) The damages were not excessive. The plaintiff was entitled to the verdict rendered under his complaint. (Code, § 481.) Defendant's offer to show that Reilly had endeavored to induce Plass to make a false statement as to the condition of another car on the occasion of another accident was properly excluded. (*Gale v. Central R. R.*, 76 N. Y. 594; *Higham v. Ganet*, 15 Hun, 383.)

EARL, J. This action was brought to recover damages for injuries received by the plaintiff by being knocked down and run over by one of defendant's cars on the Third avenue in the city of New York. Plaintiff recovered a verdict of \$15,000. The judgment entered upon that verdict was affirmed at General Term and then the defendant appealed to this court.

The learned counsel for the appellant presents for our consideration three grounds, upon which he asks to have the judgment reversed, and I will briefly notice each ground separately.

First. Plaintiff's cause of action is alleged in the complaint in three different counts. In the first count he alleges that on the 30th day of October, 1877, he got upon the rear platform of one of defendant's cars as a passenger, for the purpose of riding down the avenue to his home; and that the conductor of the car came to him and, without asking for his fare, or giving him opportunity to pay it, violently pushed and threw him off the platform on to an adjoining railway track immediately in front of the horses attached to a car coming up the avenue; and that he was knocked down, run over and severely injured, "to his damage \$10,000."

In the second count the plaintiff alleges that on the same day he was accidentally upon the railway track, and that before he could escape therefrom he was knocked down by the horses attached to one of defendant's cars and run over and injured, because there was a defective brake upon the car, in consequence of which it could not be stopped in time to save him from injury, and the count closes "to his damage \$10,000."

In the third count he alleges that, on the same day, he was run over and severely injured upon defendant's railway track in consequence of the carelessness and unskillfulness of the driver of one of defendant's cars, "to his damage \$10,000."

The complaint concludes with a prayer for judgment for plaintiff's damages "in the premises to the amount of \$20,000."

Upon the trial in his charge to the jury, the trial judge ruled that the plaintiff could recover only by satisfying the jury that he was pushed or thrown from the car by the conductor and thus injured as alleged in the first count of the complaint, and it must be assumed that the verdict was based upon that theory. The claim of the learned counsel for the defendant is, that as the first count alleges damages for but \$10,000, and the recovery was had under that count, the verdict for \$15,000 was unauthorized. But we think that the general prayer for damages at the conclusion of the complaint must control in this case. It is clear, on the face of the complaint, that all the counts have reference to the same accident, and the same injury, and that the different counts really allege the same cause of action in different forms.

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The action was commenced to recover on account of the one injury caused by defendant at the time and place named in the complaint, and in such a case the allegation, at the end of each count, of the damage which the plaintiff sustained, may be disregarded, the general prayer for judgment being sufficient to authorize and uphold the verdict.

Besides, if the complaint should have alleged in the first count damages to the amount of \$15,000, in order to sustain the verdict rendered, the defect in the complaint is one of the kind which may be amended. It did not affect the trial in any way or mislead or prejudice the defendant. The variance between the complaint and the verdict is such as "the right and justice" of the matter require should be disregarded or amended, and ample authority is given for this in section 722 of the Code of Civil Procedure, which provides that "each of the omissions, imperfections, defects and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter and not altering the issue between the parties, or the trial, must when necessary be supplied and the proceeding amended by the court wherein the judgment is rendered or by an appellate court." This ground of error, therefore, does not furnish sufficient reason for reversing or modifying the judgment.

Second. It is also contended that the alleged act of the conductor, in pushing and throwing the plaintiff from the car, was so willful, reckless and malicious that the defendant is not responsible for it. That the defendant is responsible for it is abundantly shown by recent cases in this court. (*Jackson v. Second Avenue R. R. Co.*, 47 N. Y. 275; 7 Am. Rep. 448; *Rounds v. Del., Lack. & West. R. R. Co.*, 64 N. Y. 137; 21 Am. Rep. 597; *Day v. Brooklyn City R. R. Co.*, 12 Hun, 435; affirmed in 76 N. Y. 593; *Hoffman v. N. Y. C. & H. R. R. Co.*, in this court, not reported, 87 N. Y. 25.)

Third. But there remains a more serious allegation of error to be considered. Upon the trial there was great conflict in the evidence bearing upon the accident. The plaintiff and two witnesses, Reilly and Morton, two discharged car-drivers for-

merly in the service of the defendant, testified that the conductor of the car upon which the plaintiff attempted to ride pushed or threw him off directly in front of the horses attached to a car going up the avenue, and that he was injured in that way. The conductor and another witness testified that the boy was not pushed or thrown off, but that he jumped off from the car and ran in front of the horses and was thus injured without any fault or misconduct of the conductor, and there was other evidence and circumstances bearing upon the credibility of the testimony given by the plaintiff and his witnesses. Reilly, upon cross-examination by defendant's counsel, was asked if he recollected a conversation with one Plass, a driver of one of defendant's cars, and approaching him to get him to say his brakes were out of order, in order to fix the company with liability. He denied ever at any time or place having any such conversation with Plass, and testified that he knew he had no conversation with him to get him to so testify. Afterward Plass was called as a witness on the part of the defendant, and testified that he recollected Reilly's approaching him and having a conversation with him in reference to the brakes of his car, and he was then asked what that conversation was, which was objected to by plaintiff's counsel. Defendant's counsel then offered to prove that upon another occasion, not distant from the present accident, Reilly endeavored to procure the witness to make a false statement in regard to the condition of a car on this road, for the proposed purpose of fixing the liability upon the company, he having been discharged from the employment of the company, to show malice and ill-feeling on the part of Reilly. The evidence thus offered was objected to by plaintiff's counsel as immaterial, irrelevant and collateral, and the objection was sustained and the evidence excluded. In this ruling the counsel for the appellant claims there was error and we are of that opinion. The credibility of Reilly as a witness was one of the questions to be determined by the jury. It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify or that he entertains

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malice toward that party, and so it has been held in many cases. (*Starks v. The People*, 5 Den. 106; *Newton v. Harris*, 6 N. Y. 345; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 91; *Starr v. Cragin*, 24 id. 178; *Long v. Lamkin*, 9 Cush. 365; *Collins v. Stephenson*, 8 Gray, 441; *Drew v. Wood*, 26 N. H. 363; *Hutchinson v. Wheeler*, 35 Vt. 340; *Atwood v. Welton*, 7 Conn. 71; *Gale v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 595.) In *Starks v. The People*, Starks was indicted in the General Sessions of Oswego county for burning the barn of Perkins, and upon the trial Perkins was sworn as a witness for the prosecution. On his cross-examination he was asked whether he did not, during the then last winter or spring, when speaking to one Dunton and referring to a certain black ash swamp, say "there would be a good place to kill Starks," and he answered that he had not so stated. Dunton was afterward called on the part of the prisoner, who offered to prove by him that during the then last winter or spring, before the burning of the barn, Perkins speaking to him of the black ash swamp, did say it would be a good place to kill Starks. The district attorney objected to the evidence so offered as irrelevant, and because the declaration offered to be proved was made prior to the burning of the barn, and the court sustained the objection and excluded the evidence. The prisoner was convicted. The Supreme Court reversed the conviction and granted a new trial, holding that the evidence was competent and should have been received to show hostility or malice on the part of the witness toward the prisoner. In *Newton v. Harris*, it was held, as stated in the head-note, that upon "cross-examination a witness may be questioned as to statements made by him indicating feelings of hostility to the party against whom he is called, and if he denies making such statements, they may be proved by other witnesses." In *Gale v. N. Y. C. & H. R. R. R. Co.* (76 N. Y. 594), it is said that "it is not disputed that it is competent to show that a witness who has testified against a party is hostile to such party, and this may be shown by the witness himself or other competent evidence in contradiction of him." In 1 Greenleaf's Evidence (§ 450, Redfield's ed.)

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it is said: "It has been held not irrelevant to the guilt or innocence of one charged with a crime, to inquire of the witness for the prosecution, on cross-examination, whether he has not expressed feelings of hostility toward the prisoner. The like inquiry may be made in a civil action, and if the witness denies the fact, he may be contradicted by other witnesses." Inquiry into the state of the feelings of a witness toward either party is not collateral, and may always be made. The evidence to show the hostile feelings of a witness when it is alleged to exist should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issues in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred. Here the proof offered was direct and positive. Reilly was a witness for the plaintiff to establish the liability of the defendant for an accident causing injury, and here was an offer to show that he had before endeavored to procure a witness to testify falsely in order to fasten a liability upon the defendant. If the offer had been to show that he had endeavored to suborn a witness to testify falsely against the defendant in this action, no one can doubt that the evidence would have been competent for the purpose of showing hostility and ill-will toward the defendant. And the fact that he endeavored to procure a witness to swear falsely against the defendant in some other case is just as competent and substantially as potent to show the same hostility.

We think the evidence should have been received, and for the error in rejecting it the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent.

Judgment reversed.

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MARSHALL ROBBINS, Respondent, v. LOUIS S. ROBBINS, Appellant.

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Defendant purchased and paid for certain lands which he caused to be deeded to F., upon an oral understanding that the latter would hold them subject to his order. F., thereafter, at the request of defendant, pursuant to such understanding, and without other consideration, conveyed the lands to defendant's son, the plaintiff, who agreed orally to hold the title for the use and benefit of defendant and subject to his order. Defendant went into possession at the time of the original purchase, managed the lands and received the rents and profits. Plaintiff, at the request of the defendant, conveyed the lands, receiving for a portion of the purchase-money, two bonds and mortgages; one bond and accompanying mortgage defendant sold for his own benefit, and at his request plaintiff assigned them, not questioning his father's title. The other bond and mortgage was, with plaintiff's knowledge, delivered to defendant, and upon the refusal of the latter to deliver them up on demand plaintiff brought this action in equity to have it adjudged that he was owner of them and entitled to the possession. *Held*, that the provision of the statute of uses and trusts (1 R. S. 728, § 51) declaring that where a grant is made to one person, the consideration being paid by another, no use or trust shall result in favor of the latter, but title shall vest in the former, had no application; that, conceding the trust to be invalid, it having been executed by plaintiff, the right to the purchase-money vested at once in the defendant; that plaintiff, by operation of law, took the bond and mortgage as trustee for defendant, and those securities being personal property the statute had no application.

It seems that if said statute, or the provision of the statute of frauds prohibiting the creation of trusts in lands, save by a writing (2 R. S. 134, § 6), applied, plaintiff had no such right to the securities as a court of equity would enforce.

Robbins v. Robbins (15 J. & S. 193), reversed.

(Argued April 24, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 7, 1881, which affirmed a judgment, in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 15 J. & S. 193.)

This action was brought to have it adjudged that plaintiff is

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the owner and entitled to the possession of a certain bond and mortgage in the possession of defendant.

The material facts are stated in the opinion.

Walter Edwards, Jr., for appellant. The subject of the controversy in this action is personal property and is in no way affected by, or within the purview of the statute relating to uses and trusts. (*Kane v. Gott*, 24 Wend. 641; *Savage v. Burnham*, 17 N. Y. 561; *Brown v. Harris*, 25 Barb. 134.) The verbal promise and the conveyance made to plaintiff in reliance thereon imposed a high moral obligation, which he was at liberty to recognize and he was bound to fulfill the duty imposed by such obligation. (*Ocean National Bank v. Hodges*, 9 Hun, 161-165; *Davis v. Graves*, 29 Barb. 480, 485; *Simeon v. Schurck*, 29 N. Y. 598, 612, 613; *Foote v. Bryant*, 47 id. 544, 549.) The facts of this case as found by the court, including the plaintiff's conduct and declarations, show that he held the bond in controversy in trust for the defendant who is entitled to all beneficial interest therein. (*Day v. Roth*, 18 N. Y. 448, 453; *Tracy v. Tracy*, 3 Bradf. 57; *Ocean Bank v. Hodges*, 9 Hun, 161-165; *Davis v. Graves*, 29 Barb. 480-85; *Simeon v. Schurck*, 29 N. Y. 612-13; *Foote v. Bryant*, 47 id. 549.) Even while the title to the real estate was in Marshall Robbins it was unaffected by the statute of uses and trusts. (1 Edm. Stat., 677, § 51; 1 Bl. Comm. 297; 1 Parsons on Contracts [6th. ed.], 431; 22 Wend. 395; *Rathbun v. Acker*, 18 Barb. 393; *Chase v. N. Y. Central R. R.*, 26 N. Y. 523, 525; *Donaldson v. Wood*, 22 Wend. 395-397; *Ryan v. Dox*, 34 N. Y. 307; 45 id. 596; 52 id. 260; *Simeon v. Schurck*, 29 id. 598; *Foote v. Bryant*, 47 id. 544; *Foote v. Foote*, 58 Barb. 258; Willard's Equity [Potter's ed.], 599; Hill. on Trustees, 144; *Ryan v. Dox*, 34 N. Y. 307; *Carr v. Carr*, 52 id. 251-60.)

Luther R. Marsh for respondent. The statute executes this title in the grantee, the plaintiff. No use or trust results in favor of the defendant who paid the consideration. (1 R. S. 747, § 51; *Garfield v. Hatmaker*, 15 N. Y. 475; *Hurst v.*

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Harper, 14 Hun, 280 ; R. S. 135, § 6 ; Sess. Laws 1860, chap. 322 ; *Cook v. Barr*, 44 N. Y. 156-160 ; *Leman v. Whiteley*, 4 Russ. [Eng. Ch.] 423 ; *Steere v. Steere*, 5 Johns. Ch. 1.) The presumption of law and equity is that under the circumstances the transaction was an advance from father to son. (Perry on Trusts [2d ed.], 143, 144 ; Story on Equity [11th ed.], 496-498 ; *Davis v. Shield*, 26 Wend. 341, 350, 351.)

DANFORTH, J. The plaintiff's application is to the equitable jurisdiction of the court ; but a case suggesting fewer considerations likely to influence a court of equity in its favor, or more opposed to the rules and maxims by which such a tribunal must be guided than the one on which he relies, has not been brought to our attention. In the diversity of causes of action it seldom happens that one is found which has no other support than an admitted breach of confidence, and violation of trust reposed by a father in his son. Such is this case.

In September, 1869, the defendant, for \$100,000, purchased lands in Rye, Westchester county, and satisfied the price thereof. He, for reasons which do not appear, directed the deed therefor to be made out to one Fay, who was then in his employment, and who accepted the conveyance at his request, upon an oral understanding that he would hold the premises subject to the order, and for the convenience of the defendant. On the 9th of December, 1871, at the request of the defendant, and in execution of the trust and confidence so reposed in him, and upon no other consideration Fay conveyed the premises to the plaintiff, who is the son of the defendant. The plaintiff gave no consideration whatever either to Fay or the defendant for such conveyance, or the premises described therein. At this time the defendant was in the habit of reposing great confidence in the plaintiff, and making or procuring to be made to him conveyances of land belonging to or purchased by the defendant, in the trust and confidence that the plaintiff would dispose of such land and premises for the use and benefit of defendant, and as he might direct and request, and at the time of the conveyance from Fay, the plaintiff expressly agreed with

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the defendant, although not in writing, to hold the title to the premises described therein for his use, benefit and convenience, and subject to his order. The defendant, at the time of his purchase went into the actual possession of the premises, and notwithstanding the conveyance to Fay, and that from Fay to the plaintiff, continued in the possession thereof by himself or his tenants, and received at all times the proceeds and rent of the land, and solely and without direction from the plaintiff managed the property. In October, 1872, at the request and for the benefit and convenience of defendant, the plaintiff conveyed the premises to Frederick J. Ferris and John Shillito, Jr., for the consideration expressed in the conveyance of \$100,000. To secure payment of part of this purchase-money, they executed to the plaintiff two bonds and mortgages upon the premises, one for \$45,000, the other for \$15,000. The \$15,000 bond and mortgage was subsequently in July, 1873, sold by the defendant for his own benefit, and by his direction the plaintiff executed to the purchaser an assignment thereof. The defendant then claimed to be the owner of the property, and giving a reason (which involved no immoral or illegal purpose) why he had the title in his son's name, and the latter, although present, neither "contradicted, denied, or questioned it." The other bond and mortgage, which is the one now in question, were a few days after execution, with the knowledge and consent of the plaintiff, delivered to the defendant, and have since remained in his custody. These facts are found by the trial court. In November, 1879, the plaintiff demanded of his father the bond, and being denied, commenced this action in February, 1880, for the purpose of having it adjudged "that he is the sole owner and holder of the bond and mortgage," and entitled to the immediate possession thereof from the defendant. Thus the facts, which were not in writing, have in a litigation moved by the plaintiff been found to exist, and upon them the court is to say "whether the plaintiff hath title in conscience to recover or not."

In the first place it is obvious that a clear and absolute trust in the plaintiff, in favor of the defendant, was established in

regard to the premises conveyed to the former by Fay, which a court of equity would recognize and enforce (*McCartney v. Bostwick*, 32 N. Y. 53) unless prevented by the statute (§§ 51, 56, *infra*). But here we are to consider that the defendant is not in court of his own motion. He is brought in by the plaintiff, who is compelled to come here and ask for the relief which he cannot obtain elsewhere. He concedes the defendant's case, but to defeat it relies upon the statute (1 R. S., § 51, title 2, part 2, chap. 1, art. 2, p. 728), which declares that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance," subject to an exception, in favor of creditors, of no importance here. The existence of a state of facts embraced in this provision, and but for which the defendant would have a clear case, is assumed by the learned counsel for the respondent, and the claim made, that under these circumstances the defendant cannot make out a trust, "except by a writing declaring the trust, and subscribed by the plaintiff," relying in support of this proposition upon section 6 (2 R. S., title 1, part 2, chap. 7, p. 134), which prescribes these formalities in the creation of certain interests in lands.

It may, however, be observed at the outset that it is also provided by the same statute (§ 10), that the provisions of that title "shall not be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements," and that it is a well settled doctrine, that in cases of fraud equity will relieve, even against the words of a statute. The question then is, whether the plaintiff has such a right to the bond and mortgage in controversy as a court of equity will enforce; or to bring the question into a narrower compass, whether provisions of law, intended to prevent fraud, can be successfully invoked to secure to a wrong-doer the fruits of his iniquity.

The answer is easy. In *Reech v. Kennegal* (1 Ves. Sr. 123),

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the lord chancellor says: "The court has always adhered to this principle, that the statute should never be understood to protect fraud, and therefore, whenever a case is infected with fraud, the court will not suffer the statute to protect it so that any one should run away with a benefit not intended." A few instances of the application of this doctrine will make much discussion quite unnecessary. *Nelson v. Worrall* (20 Iowa, 469), brought before the court a verbal transaction between father and son, the heirs of the father suing the heirs of the son to recover the undivided half of certain real estate. It was purchased from the government and entered by the son in his own name, the father furnishing one-half of the purchase-money, the title to one-half to be held by the son in trust for the father. Both parties went into possession. The trust was denied. The court held it was not within the statute, and upon these facts the agreement might be enforced in equity, and especially so "if the father entered into possession in accordance therewith, and held the land thereunder until his death," saying, "such agreements have been frequently enforced in this State;" but dismissed the bill for want of sufficient evidence.

In *Haigh v. Kaye* (L. R., 7 Ch. App. Cas. 469), a very recent case, it appeared that the plaintiff had conveyed to the defendant, by absolute deed expressing a consideration, certain premises, but in fact, as he alleged, "in trust for him," and to be reconveyed upon demand. The defendant reposed upon the letter of the deed, and refused to convey. Being sued, he relied upon the statute of frauds and claimed the estate as his own, discharged from any trust. The master of the rolls directed a reconveyance, and upon appeal the same statute was set up and the allegation made that the conveyance was in view of an adverse decision in a case pending between the plaintiff and some other party. The court in strong language expresses its opinion of the defense, saying: "If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms and must clearly put forward his own scoundrel-

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ism, if he means to reap the benefit of it;" and referring to the claim that under the statute any declaration of trust or confidence must be shown in writing, says: "The statute of frauds was never intended to prevent a court of equity from giving relief in a case of plain, clear and deliberate fraud."

The same principle has been frequently acted upon by this court (*Ryan v. Dox*, 34 N. Y. 307; *Wheeler v. Reynolds*, 66 id. 227) in both of which cases a full and careful examination was made of the reasons and authorities on which it rests. Indeed the decisions are all one way. They establish as a fundamental doctrine of a court of equity that the statute of frauds was not made to cover fraud. In the cases especially referred to, the wrong-doer was forced into court. In this case he comes in voluntarily, asking the court to aid him in the perpetration of his fraud, and without even the poor excuse found in other cases, that by the conveyance to him, the defendant meditated a fraud on others. In the next place, the plaintiff is not entitled to have the statute (§ 51, *ante*) strained in his favor, and taken literally it does not cover his case. The grant to him was from Fay, and for that no valuable consideration was paid; Fay conveyed because in common honesty, and in fulfillment of his trust, he was bound to convey. The plaintiff's claim is *stricti juris*. The statute (§ 51) now invoked by the plaintiff, if operative in such a case and according to the plaintiff's claim, was effectual as between Fay and the defendant, and vested in Fay the title so completely that the defendant had no legal or equitable interest in the land. (*Garfield v. Hatmaker*, 15 N. Y. 475.) Fay had a right, however, to recognize his moral obligation and convey it to such person as defendant chose (*Siemon v. Schurck*, 29 N. Y. 598; *Foots v. Bryant*, 47 id. 544), and upon such conditions as he thought fit to impose or prescribe. It was the plaintiff's promise to perform those conditions, which led to the execution of the deed to him.

But another and conclusive answer to the plaintiff's case is, that as by his express agreement he was to hold the title to the land conveyed "for the use, benefit and convenience, and sub-

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ject to the order of the defendant," he did in consummation of the sale to Ferris and Shillito, by direction of the defendant, and for his benefit and convenience, execute a deed to them. At the same time possession went to them from the defendant. The trust was executed, and whether the defendant could have compelled it or not is immaterial. The plaintiff responded to the call of his *cestui que trust*, and from that moment had no further concern, or interest, real or apparent, in the property. His whole duty as trustee was discharged. Nothing then remained but a right to the purchase-money, and this vested at once in the defendant. Although the bond and mortgage, in form, ran to the plaintiff, he took as trustee for the defendant, by implication of law, if not by agreement. Those securities were personal property only and had no relation to the statute.

It is not necessary to inquire whether the defendant could, by any legal proceeding, have compelled the plaintiff to convey the lands; he has done so in performance of his undertaking, and without compulsion. Nor is it necessary to inquire whether if he had received the consideration of the deed in money it could have been taken from him. He did not receive it, and is now in a court of equity seeking to obtain it. Notwithstanding the ingenious and persuasive argument of the learned counsel for the respondent, we have found no ground upon which the claim can stand.

The judgment of the General and Special Terms should be reversed, and the defendant have judgment dismissing the complaint, and adjudging that the bond and mortgage described therein are the property of the defendant, and that the plaintiff pay to him his costs of this action.

All concur.

Judgment accordingly.

Statement of case.

In the Matter of the Assignment of MILAN HULBURT et al.
to ADRIAN VAN SINDERIN as Assignee, etc.

Where, after an assignment for the benefit of creditors, and after a sale and collection of a portion of the goods and accounts assigned, which sale and collection were made by the assignor and a clerk who had been put in charge by the assignee, the assignors compromised with their creditors, who executed a composition deed, *held*, that as it appeared that commissions on the moneys which were actually received by the assignee would be a fair and reasonable compensation for the services rendered he was only entitled thereto, not to commissions upon the value of all the assigned property.

The provision of the act in relation to such assignments (§ 26, chap. 466, Laws of 1877, as amended by § 7, chap. 818, Laws of 1878), which provides that the assignee shall receive the commissions specified "on the whole sum which will have come into his hands" refers to the money actually received not to the property assigned.

It seems that an assignee may protect himself by an agreement against the contingency of a composition before the conversion of any of the assigned property into money by an agreement with the assignor before he accepts the assignment, for his compensation in such case.

It seems, also, that the court may, in such case, before it will compel the assignee to return the assigned property, order reasonable compensation to be made to him as a condition of such return.

In re Bunch (12 Wend. 280), distinguished.

(Argued April 25, 1882; decided May 30, 1882.)

APPEAL by the assignors from an order of the General Term of the Court of Common Pleas in and for the city and county of New York, made February 6, 1882, which modified and affirmed as modified an order of Special Term on settlement of the accounts of Adrian Van Sinderin, as assignee for the benefit of creditors of Milan Hulburt and William A. Hulburt, composing the firm of Merwin, Hulburt & Co.

The material facts are stated in the opinion.

Samuel Hand for appellants. The amendment of 1878 to the General Assignment Act of 1877, fixing the assignee's commissions at five per cent on the whole sum which will have come into his hands, should be construed so as to carry out the

Statement of case.

policy of the common law. (*Chamberlain v. The West. Trans. Co.*, 44 N. Y. 309; *Donaldson v. Wood*, 22 Wend. 397; *Jewett v. Woodward*, Edw. Ch. 195; *Barney v. Griffin*, 2 N. Y. 372; *Nichols v. McEwen*, 17 id. 22; *Campbell v. Woodworth*, 24 id. 304; *Duffy v. Duncan*, 35 id. 190; *Jacob v. Remsen*, 36 id. 668; *Ogden v. Murray*, 39 id. 202.) The assignee should recover five per cent on all sums of money which will have come into his hands by the performance of his trust in collecting debts and in realizing upon assets. (*In re Shaw*, 18 Hun, 195; *In re Kenyon v. Cox*, Com. Pl., Sp. T., August, 1877, cited in Kieley on Insolvent Assignments, 137; 2 R. S. [2d. ed.] 47, § 29; *Duffy v. Duncan*, 35 N. Y. 190; *Case of Bunch*, 12 Wend. 280, 284; *In re Woven Tape Skirt Co.*, 85 N. Y. 506; *McWhorter v. Benson*, Hopk. Ch. 42; *Wagstaff v. Lowerre*, 23 Barb. 226; *DePeyster Case*, 4 Sandf. Ch. 511; *Bennett v. Chapin*, 3 Sandf. Sup. Ct. 673; *Schenck v. Dart*, 22 N. Y. 420; *Meacham v. Sternes*, 9 Paige's Ch. 398; *Cairns v. Chaubert*, id. 164; 3 R. S., part 2, chap. 6, art. 3, § 71; § 2736 of the Code, as amended June 16, 1881, chap. 535; *Van Buren v. Chenango Ins. Co.*, 12 Barb. 671; *German Am. Bk. v. M. R. C. Co.*, 68 N. Y. 585.) The provision of the order made at Special Term vacating the allowance of \$2,000 to counsel for the assignee, for services upon the accounting, is eminently proper and should be sustained. (*In re Assignment of Curren*, 8 Daly, 122; *In re Weinhaus*, 5 Abb. N. C. 355; *Havemeyer v. Loob*, id. 338; *Burtis v. Dodge*, 1 Barb. Ch. 77; Redfield on the Law and Practice of Surrogates' Courts [latest ed.], 710.) The General Term erred in referring the claim for services rendered upon the accounting back to the referee. (In *Levy's Accounting*, *In re Assignment of Currer*, 8 Daly, 122; *Tilton v. Beecher*, 59 N. Y. 176; *Morris v. Wheeler*, 45 id. 708.) Allowances can only be made in the reasonable discretion of the court, and if unreasonably made, are appealable. (*Downing v. Marshall*, 37 N. Y. 380; *Wetmore v. Parker*, 52 id. 450.) The referee's fees, being in excess of the statutory allowance, were improperly granted. (Code, §§ 3296, 3297; *Currer Case*, 8 Daly, 119.)

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John L. Sutherland for respondent. On surrendering the estate, the assignee was entitled to five per cent commissions on its true value, notwithstanding the composition. (Laws of 1878, chap. 318, § 7; 3 R. S. [5th ed.] 119, § 31; 2 R. S. 46, § 29; *Matter of Bunch*, 12 Wend. 280; *German Am. Bk. v. M. R. C. Co.*, 68 N. Y. 589, 590; *Kildreth v. Ellice*, 1 Caines, 192; *Bolton v. Lawrence*, 9 Wend. 425; *Parsons v. Bowdoin*, 17 id. 14; *Crofut v. Brandt*, 58 id. 106; *Mc Whorter v. Benson*, Hopk. Ch. 42; *Matter of Bunch*, 12 Wend. 380; *Cairns v. Chaubert*, 9 Paige, 164; *Meacham v. Sternes*, id. 404, 405; *Matter of DePeyster*, 4 Sandf. Ch. 511; *Bennett v. Chapin*, 3 Sandf. Sup. Ct. 673; *Van Buren v. Chenango Ins. Co.*, 12 Barb. 673; *Wagstaff v. Lowerre*, 23 id. 226, 227.) The order appealed from is not a final order, and no appeal lies to this court from it. (Code of Civil Procedure, § 170; *Clark v. Brooks*, 1 Abb. Ct. of App. Dec. 355; *Hollister Bk. v. Vail*, 15 N. Y. 593; *Tompkins v. Hyatt*, 19 id. 534; *Catlin v. Grissler*, 57 id. 363; *Swarthout v. Curtis*, 4 id. 415; *Butler v. Lee*, 3 Keyes, 70.)

EARL, J. On the 28th day of October, 1880, Milan Hulburt and William A. Hulburt, the appellants, who were doing business as a firm in the city of New York, having become financially embarrassed, made a general assignment for the benefit of their creditors, to the respondent Van Sinderin. The assignee took formal possession of the assigned property, which consisted of merchandise and book accounts. The property remained in the store of the assignors in charge of their former book-keeper, who was selected by the assignee as his representative. The assignors and the person thus placed in charge sold goods and made collections to the amount of \$45,374.53, which sum was paid to and received by the assignee. Thereafter, before the close of January, 1881, all the creditors of the assignors executed a composition deed, by which they agreed to accept the notes of the assignors for sixty per cent of their claims and release the assignors and their estate, as well as the assignee and his sureties, from all liability to them.

The composition was brought about solely by the efforts of the assignors, and the assignee did not personally sell any of the property or collect any of the debts. In March, 1881, an order was made by one of the judges of the New York Common Pleas appointing a referee to take and state the account of the assignee. A hearing was had before the referee, and he found the actual value of the property assigned to be \$232,941.08, and he determined that the assignee was entitled to five per cent for his commissions on that sum, amounting to \$11,647.05, and he allowed to the counsel of the assignee, for his services before the accounting, \$2,000, and for his services upon the accounting another sum of \$2,000. The General Term of the Common Pleas confirmed the decision of the referee as to these items, except as to the counsel fee upon the accounting, and referred that back to the referee for a further hearing as to the value of the services of the counsel upon the accounting. From the decision of the General Term the assignors have brought this appeal, and here complain mainly of the amount allowed for commissions. They claim that the commissions should have been computed only upon the sum of money which came into the hands of the assignee, while he claims that his commissions were properly computed upon the value of all the property which was assigned to him.

Section 26 of the General Assignment Act of 1877, as amended by section 7 of chapter 318 of the Laws of 1878, provides that the assignee shall receive for his services "a commission of five per centum on the whole sum which will have come into his hands;" and the matter now to be decided is, what was meant by this language? If it had been stated in the section that the commission was to be five per centum on the entire value of the property, or amount of property, or sum of money, it would have been plain enough. The words "the whole sum" are entirely inappropriate to express the entire amount of property, but they are appropriate to express the whole sum of money which may have come into the hands of the assignee, and we think they were used in that sense. The rate of commission is a large fixed sum, larger than is allowed in other analogous

Opinion of the Court, per EARL, J.

cases, such as sheriffs, executors, administrators and trustees. The statute contemplates the possibility of such a composition as was made in this case, and provides for the discharge of the assignee when it is made. Thus it may turn out that the assignee may be discharged from all liability before he has done any thing except to execute his bond and take formal possession of the assigned property, and if the legislature had intended, in such a case, that the commission should be computed upon the value of all the property assigned, more appropriate language would, we think, have been used. In most cases where compositions are effected by the assignors, the commission of five per cent on the whole property assigned would be greatly disproportionate to the value of the services rendered by the assignee, and we think the legislature, in fixing the rate of commission, had in mind only the money which should come into the hands of the assignee.

It may be said that this construction will deprive the assignee of any compensation in case a composition is made by the assignor before the assignee has converted any of the assigned property into cash. Such cases, however, will not be common and the assignee can always protect himself by an agreement with the assignor before he accepts the assignment as to the amount of his compensation in case of a composition. Such an agreement would be valid as between the assignor and assignee while it would be invalid so far as it affected the interests of creditors. When one voluntarily consents to act as assignee he must either take what the law gives him or, where the rights of creditors are not concerned, what the assignor agrees to give him. And it may be said further, that when the assignee has received no money upon which his commissions can be computed, the case is not provided for by the statute, and the court may, before it will compel him, after a composition, to return the assigned property to the assignor, order a suitable and reasonable compensation to be made to him as a condition of such return.

We do not intend by this construction to alter or affect the rules which have been laid down for computing the fees or commis-

sions of sheriffs, executors, administrators and trustees. A sheriff is not a volunteer. He discharges a duty imposed upon him by law, and his fees are not large, and the commissions of executors and trustees are not large, and would not be excessive in most cases, if computed upon the whole property which has come into their hands, and which in the end they may distribute or dispose of as money. Our construction of the act now under consideration is confined to the language used and the consideration of what we conceive to have been the purpose of the legislature.

Much reliance is placed by the assignee upon the case of *In re Bunch* (12 Wend. 280). In that case an attachment was issued at the instance of one Mitchell against Bunch, a non-resident debtor, and trustees were appointed, and the trustees caused Bunch to be brought before the officer who issued the warrant of attachment, and while the proceeding was pending Bunch compromised with Mitchell, and gave him a bill of exchange for upwards of \$19,000, in consideration whereof Mitchell gave him a general release and discharge from all liability. In that case the statute provided that the trustees should receive a commission of five per cent on the "whole sum which shall come into their hands," and the court held that the trustees were entitled to their commissions on the whole amount of the bill of exchange, although it did not come into their hands. The bill of exchange, was received by the creditor as so much money, and that was the sum realized by the proceeding which was instituted. SAVAGE, C. J., writing the opinion of the court, said: "The meaning of the act is that the trustees shall receive a commission upon such sum as shall be realized in consequence of the proceedings instituted, and can there be a doubt but that the attaching creditor received upwards of \$19,000, in consequence of these proceedings?" It is thus seen that that case is entirely unlike this. Here nothing was realized by the efforts of the assignee, and in no sense was the property assigned to him converted into cash, or disposed of by him as cash except as to sales and collections actually made.

Our recent decision *In the Matter of the Woven Tape Skirt*

Co. (85 N. Y. 506) furnishes some support to the conclusion we have reached.

Commissions have sometimes been allowed on the whole amount of property which has come into the hands of a trustee as an equitable mode of adjusting his compensation ; but constructive commissions, that is commissions on property not converted into cash, may, upon an equitable accounting, be refused to a trustee, when their allowance would be inequitable and unjust. Here the commissions claimed are so disproportionate to the value of the services rendered that their allowance cannot be justified upon any principles of equity or justice. The rule which gives the assignee his commissions upon the money which actually came into his hands will in this case measure the compensation more accurately and justly than any other which could be adopted.

As to the \$2,000 allowed to the assignee for the services of his counsel prior to the accounting, there was but a very meager case upon which to base such an allowance. The assignee was an attorney and counselor at law. The printed record does not disclose that there was any litigation or dispute about any thing connected with the assigned estate. It is not revealed how the services of an attorney came to be needed, or what particular services he rendered, for which a compensation of \$2,000 could be claimed ; but as there was some evidence to sustain the charge, and the court below was satisfied with it, we will not disturb it. As to the charge of \$2,000 for services of counsel upon the accounting where there was no dispute, contest or litigation, we think the court below did well to refer that item back for further investigation.

Our conclusion, therefore, is that the judgment of the court below should be modified by reducing the commissions allowed to \$2,268.72, five per cent on the money actually received, and as thus modified, affirmed without costs in this court to either party.

All concur, except TRACY, J., absent.

Ordered accordingly.

Statement of case.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff in Error, *v.*
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY, Defendant in Error.

The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway is not *per se* a nuisance.

The duty of restoration of "the highway as near as may be to its former state, so as not to unnecessarily impair its usefulness," imposed by its charter (§ 5, chap. 195, Laws of 1846), upon the N. Y., N. H. & H. R. R. Co., does not absolutely require it, at such a crossing, to construct the bridge of the full width of the highway, the requirement is simply to so construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway.

pon the trial of an indictment against said corporation for alleged nuisance in constructing a bridge over its road for a highway, of less width than the highway, it appeared that the highway, when defendant's road was constructed, was owned by a turnpike company which, by its charter (Chap. 121, Laws of 1800), was required, where a bridge was necessary, to build it not less than sixteen feet wide. Defendant, prior to 1850, constructed its road across the highway below its surface, and built a bridge for the highway about sixteen feet wide; this was replaced by a new one in 1852 or 1853 about nineteen and one-half feet wide; both were approved by the turnpike company. In 1879, after the rights of said company in the highway had been extinguished, defendant built the bridge in question which was twenty-four feet wide, with the roadway twenty-two and one-half feet in width, corresponding substantially with the width of the beaten track of the highway. The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance and defendant was guilty under the indictment; that the question was whether the bridge was so constructed "as not to impair the usefulness of the road and to interfere with the enjoyment or safety of the public." *Held* error.

(Submitted April 27, 1882; decided May 30, 1882.)

ERROR to the General Term of the Supreme Court, in the second judicial department, to review order made the second Monday of February, 1882, which reversed a judgment of the Court of Sessions, convicting the defendant in error of having created a public nuisance by encroaching upon a highway in the town of Rye, Westchester county.

The highway was four rods wide. Defendant's road crossed it by a cutting about twenty feet below the surface of the high-

Statement of case.

way. The act complained of was the construction of a bridge for the highway, twenty-four feet wide, with fences running from the sides of the highway to each end of the bridge.

The material facts are stated in the opinion.

Keogh & Boothby for plaintiff in error. The court was right in admitting evidence of the width and condition of the road at the point in question, prior to 1846, when the railroad was put through. (Laws of 1846, chap. 195, § 5.) In requiring the railroad company to restore the road, etc., the whole road, including the foot-paths, was meant. (Laws of 1800, chap. 121, § 6, p. 264; *Reg. v. The M. & L. R. R. Co.*, 2 Railway Cases, 711; *Judson v. N. Y., N. H. & H. R. R. Co.*, 29 Conn. 438-9; *Comm. v. King*, 13 Metc. 115.) Any obstruction in any part of a highway is a nuisance if it inconveniences the public by curtailing their liberty to pass over any part of it. (*Harrower v. Ritson*, 37 Barb. 303; "Law of Nuisance," by H. G. Wood, 237-244.) It was immaterial, as to the guilt or innocence of the defendants, whether the road in question was a common highway or a turnpike road. (*Rogers v. Bradshaw*, 20 Johns. 742; *Comm. v. Wilkinson*, 16 Pick. 175; *Benedict v. Gait*, 3 Barb. 468; *Walker v. Caywood*, 31 N. Y. 60.) The title acquired by the turnpike company was not such a title as it could convey for any other purposes, except for the purposes of the road, as set forth in the act of incorporation. (*Durham v. Williams*, 36 Barb. 161; 37 N. Y. 253; *Rogers v. Bradshaw*, 20 Johns. 742; reversing *Bradshaw v. Rogers*, id. 102; *Seneca Road Co. v. The A. & R. R. Co.*, 5 Hill, 179; Laws of 1800, p. 264.) The highway commissioners had jurisdiction over the turnpike road so far as maintaining the public right to have the road-way remain of the full width originally intended and laid out, and this jurisdiction they could neither be deprived of nor relinquish, nor could they avoid the duty and responsibility of guarding and enforcing that right. (*Walker v. Caywood*, 31 N. Y. 53; Laws of 1846, p. 231, § 5; Laws of 1800, p. 264; id., chap. 121, div. 4.) Any permanent or habit-

Opinion of the Court, per ANDREWS, Ch. J.

ual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass. (*Davis v. The Mayor, etc.*, 14 N. Y. 524; *Colt v. The Lewiston R. R. Co.*, 136 id. 214.)

Close & Robertson for defendant in error. Defendant, under the conveyance and release of the turnpike road, became the owner in fee of so much thereof as was taken by defendant in the construction of its road, and conveyed to it by said turnpike company. (Act passed April 7, 1800; *Estes v. Kelsey*, 8 Wend. 559-560.) Defendant was only required to restore the highway, as near as may be, to its former state, so as not unnecessarily to impair its usefulness and to the satisfaction of the commissioners of highways. (Laws of 1846, § 5, chap. 195.)

ANDREWS, Ch. J. We concur in the opinion of the General Term that the liability of the defendant, as presented to the jury in the charge, was erroneously made to depend upon the question whether the bridge obstructed or hindered the enjoyment of the highway by the public, independently of the further question whether the company in the exercise of the right to construct its road across the highway had, in compliance with the requirements of its charter (Laws of 1846, chap. 195, § 5), restored "the highway, as near as may be, to its former state so as not unnecessarily to impair its usefulness." The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance, and the defendant was guilty under the indictment, and further that the question to be passed upon by the jury, was whether the bridge is so constructed "as not to impair the usefulness of the road, and to interfere with the enjoyment or safety of the public in their right to travel upon the road." The exception to the charge, although somewhat informal and inexact, fairly construed, raises, we think, the point whether the charge was correct in the particular mentioned. The highway, when the defendant's road was constructed, and until 1868, was owned

by a turnpike company. The turnpike company was chartered by special act of the legislature, passed April 7, 1800, "for improving the road from Eastchester to Byram," which before the charter seems to have been an existing highway, and the charter contained a provision that where a bridge or bridges are necessary, such bridge or bridges shall not be less than twenty feet wide. This doubtless primarily referred to bridges over streams, railroads not being in use at that early period, but the provision seems to indicate that in the opinion of the legislature, it might not be necessary that bridges should be as wide as other parts of the highway. The defendant constructed its road across the highway in question about twenty feet below the surface, and thus rendered the building of a bridge necessary. The first bridge was built prior to 1850, and was about sixteen feet wide. This was replaced by a new bridge built in 1852 or 1853 about nineteen and one-half feet wide, and the second bridge was used for about twenty-six years until 1879, when it was in turn replaced by the present bridge which is twenty-four feet wide, with a roadway of twenty-two and one-half feet in width, which corresponds substantially with the width of the beaten track of the highway. All the bridges were built by the defendant. The construction and dimensions of the first two bridges were, as the evidence tends to show, approved by the turnpike company. The present bridge was built after the rights of the turnpike company had been extinguished and the road had become an ordinary highway. No question arises in this case as to the construction of that clause in the fifth section of the defendant's charter, which requires a highway crossed by a railroad to be restored to the satisfaction of the commissioners of highways of the town.

The construction of defendant's railroad across the highway was authorized by law. This method of crossing below the highway, was manifestly much safer than if the crossing had been on grade. While the right of the defendant to cross below grade is not disputed, it is claimed in behalf of the people that the duty of restoration imposed by the de-

Statement of case.

fendant's charter, could only be performed by constructing the bridge of the width of four rods, that being the width of the highway. We think this construction cannot be maintained. It is not usual to construct bridges on country roads of the full width of the highway. The construction by a railroad of a bridge of less width than the highway, is not, we think, *per se*, a nuisance. It would depend on circumstances. It might in some places be necessary that a bridge should be of the full width of the highway, while in the other locations it would be quite unnecessary. The location of the bridge, whether in or near a city or village, or in a 'populous district, the extent of use of the highway, the expense of the work, and other circumstances may properly be considered in deciding the question whether the duty of the railroad company has been discharged. So also a bridge, adequate when built, may by the growth of population, become inadequate for the public accommodation. The question would then be presented, whether the duty would not be enlarged *pari passu* with the public necessity. But for the decision of this case it is sufficient to say that in our judgment the trial judge omitted to accompany his instructions to the jury with the proper qualifications. He should have submitted it to them to find upon all the circumstances whether the defendant unnecessarily impaired the usefulness of the highway by the manner of constructing the bridge. That a railroad crossing will to some extent, impair the usefulness of a highway, is implied in the language of the statute.

We think the order should be affirmed.

All concur, except TRACY, J., absent.

Order affirmed.

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EDWARD J. CHAPIN, Appellant, v. JOSEPH THOMPSON, Impleaded, etc., Respondent.

Exceptions taken upon the trial of specific questions of fact arising in an equity action and ordered to be answered by a jury should be presented for review before final judgment; they may not be considered on motion for a new trial of the action after judgment.

Statement of case.

Where an assignment for the benefit of creditors makes specific provision for the payment of a debt, the assignor cannot prevent the application of the property, in accordance with the terms of the instrument, because of the usurious character of the debt.

After the execution of a bond and mortgage, to secure a usurious loan, the borrower executed to the lender, and the latter accepted, a general assignment for the benefit of creditors; in the schedule of creditors contained in the inventory, made pursuant to the statute (Chap. 466, Laws of 1877), was inserted the name of said lender, with the amount of the loan which was described as "for money loaned secured by mortgage," and among the assets the mortgaged lands were included with the statement that they were mortgaged to secure said debt. In an action to foreclose the mortgage brought by an assignee of the mortgagee, *held*, that judgment directing the surrender and cancellation of the bond and mortgage because of the usury was error; that to the extent of the money actually loaned and legal interest thereon, plaintiff was entitled to the benefit of the assignment; that said assignment was not within the statute avoiding contracts or securities because of usury (1 R. S. 772, § 2), as it was a mere trust or appropriation of property made by the debtor, independent of the usurious contract; which gave to the creditor rights adhering to the trust property until the debt was satisfied or the property applied upon it according to the terms of the trust; also that the fact that the lender was the assignee was immaterial; and that plaintiff's rights were in all respects the same as his assignors.

(Argued April 28, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 4, 1880, which affirmed a judgment entered upon a decision of the court on trial at Special Term, and affirmed an order denying a motion for a new trial.

This action was brought to foreclose a mortgage for the sum of \$6,000, executed September 12, 1876, by the defendant Thompson, to one Abiel E. Helmer, and assigned by Helmer, on the 5th day of April, 1878, to the plaintiff.

Thompson defended the action upon the ground of usury.

In July, 1878, by order of the Special Term, it was directed that the questions of fact arising upon the answer should be tried by a jury, and interrogatories were framed for that purpose.

The issues were tried in October, 1878, at Circuit, and the jury found that the loan secured by the mortgage was made

Statement of case.

upon an understanding and agreement that the borrower should pay to the lender, as the consideration for the loan, and did pay to him, the sum of \$600 in addition to the legal and lawful interest.

In November, 1878, the case was heard at Special Term. No motion was made for a new trial of the issues, but the plaintiff, the court having approved and adopted said verdict, applied upon the pleadings, proofs and verdict for judgment of foreclosure and sale, without a judgment for the deficiency, and the defendant Thompson applied thereon for a judgment, declaring said bond and mortgage void, and enjoining any prosecution thereon, and ordering the same to be surrendered and canceled.

The further material facts are stated in the opinion.

Edwin M. Holbrook for appellant. The General Term erred in not examining and considering upon the appeal to it, the exceptions taken upon the trial of the issues submitted to a jury. (*Chapin v. Thompson*, 80 N. Y. 275; 18 Hun, 446.) The defense of usury is a personal defense, and the debtor has a right to waive it. Having waived it by his own act he cannot revoke it. (*Strong v. Strickland*, 32 Barb. 287; Burrill on Assignments [3d ed.], § 428; *Pratt v. Adams*, 7 Paige, 615; *Murray v. Judson*, 5 Seld. 73; *Candee v. Lord*, 2 Comst. 269; *Green v. Morse*, 4 Barb. 332; *Mer. Ex. Nat. Bk. v. Com. Warehouse Co.*, 49 N. Y. 635, 643; *Crane v. Turner*, 67 id. 457; *Hartley v. Harrison*, 24 id. 170; *Stevens v. Cossabacher*, 8 Hun, 126; *Garnsey v. Rogers*, 46 N. Y. 223, 242; *Douglas v. Wells*, 18 Hun, 83; *Eq. L. Asso. Soc. of U. S. v. Cuyler*, 75 N. Y. 511.)

Edward C. James for respondent. As plaintiff did not move for a new trial of the feigned issues before final judgment he was precluded from questioning the verdict or reviewing the exception taken upon the jury trial. (*Chapin v. Thompson*, 80 N. Y. 275; *Jackson v. Andrews*, 59 id. 245; *Ward v. Warren*, 15 Hun, 600.) The assignment to Helmer for bene-

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fit of creditors did not deprive Thompson of the defense of usury, and of the relief provided by the statute against usury. (*Green v. Morse*, 4 Barb. 332; *Strong v. Strickland*, 32 id. 284; *Morse v. Crofut*, 4 N. Y. 114, 121-2; Perry on Trusts, § 600; *E. L. I. Co. v. Cuyler*, 12 Hun, 247; *In re Lewis*, 81 N. Y. 421, 424; *Pratt v. Adams*, 7 Paige's Ch. 615, 639; *Pearsall v. Kingsland*, 3 Edw. Ch. 195; *Beach v. Fulton Bk.*, 3 Wend. 584; Burrill on Assignments [3d ed.], 428; *Brannock v. Brannock*, 10 Ired. 428, 431; *Murray v. Judson*, 9 N. Y. 84; *Vickery v. Dickson*, 35 Barb. 96, 98-99; *Tuthill v. Davis*, 20 Johns. 285; *Reed v. Smith*, 9 Cow. 647; *Jackson v. Packard*, 6 Wend. 415; *Shober v. Hanser*, 4 D. & B. 91; *Hartless v. Harrison*, 24 N. Y. 175; *Grey v. Green*, 77 id. 615, 619.) Where land has been conveyed subject to a usurious mortgage, which the grantee assumes to pay, such grantee cannot avail himself of the defense of usury. (*Hartley v. Harrison*, 24 N. Y. 170; *K. L. I. Co. v. Nelson*, 13 Hun, 321; 87 N. Y. 137; *More v. Deyoe*, 22 id. 208, 218; *E. L. I. Co. v. Cuyler*, 12 Hun, 247.) A creditor named in the schedules attached to an assignment is not entitled to a distributive share of the trust funds without making proof of his claim, and showing it to be valid. (*In re Bailey, Assignee*, 10 Weekly Dig. 87.) Both the assignor and assignee under an assignment which contains no provision for the payment of the usurious debt can defend for usury and obtain an absolute cancellation of the illegal claim. (*Morse v. Crofut*, 4 N. Y. 114, 121-2; *Green v. Morse*, 4 Barb. 332; *Pratt v. Adams*, 7 Paige's Ch. 615, 639; *Pearsall v. Kingsland*, 3 Edw. Ch. 195; *Beach v. Fulton Bk.*, 3 Wend. 584; Perry on Trusts, § 600; *Union Bk. v. Bell*, 14 Ohio St. 200.) Nothing was put in this assignment to induce plaintiff to purchase this bond and mortgage; nor was he induced to purchase it by any act or representation of Thompson, consequently there is no element of an equitable estoppel in this case. (*Payne v. Burnham*, 62 N. Y. 69, 73; *Strong v. Strickland*, 32 Barb. 289.) The mortgage is merely collateral to, and dependent upon, the bond. The bond being usurious and void, the mortgage falls with it.

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(*Ross v. Terry*, 63 N. Y. 613; *K. L. I. Co. v. Nelson*, 13 Hun, 345; 78 N. Y. 137.) By accepting the trust the mortgagee, Helmer, subordinated his mortgage to the trust, so that he could pursue no remedy adverse to the trust estate. (1 Johns. Ch. 174, 178; *Hopkins' Ch.* 515; 67 N. Y. 437.)

DANFORTH, J. Exceptions taken upon the trial of specific questions of fact arising in an equity action, and ordered to be answered by a jury should be presented for review before final judgment. This was held upon a former appeal involving the precise question (80 N. Y. 275), and need not again be considered. Not only did the plaintiff fail to pursue this course, but he himself produced the verdict before the Special Term, and asked for judgment in the action. The defendant did the same, and prevailed. The judgment thus founded in part upon the verdict of the jury was in fact rendered by the court in November, 1878, while the motion for a new trial was not made until June, 1880. The General Term, therefore, did not err in refusing to consider the exceptions referred to.

We are bound by the finding that the bond and mortgage from Thompson to Helmer had their inception in a usurious loan of money. There is evidence which may be so considered as to warrant that conclusion. We also concur with the General Term in the opinion that the plaintiff has no better right or equity than his assignor, Helmer, had. But as the assignee of the bond and mortgage, he is entitled to resort to any fund, means, or provision for the payment of the money which formed its consideration. His rights are in all respects the same as Helmer's, to all incidental securities and all remedies for the debt notwithstanding the assignment. (*Pattison v. Hull*, 9 Cowen, 747; *Green v. Hart*, 1 Johns. 580; *Grosvenor v. Day*, Clarke's Ch. 109; *Robinson v. Ryan*, 25 N. Y. 320; *Allen v. Brown*, 44 id. 228.)

We think, therefore, the judgment goes too far. The trial judge found that the bond and mortgage were executed and delivered on the 12th of September, 1876. He also finds that on the 22d day of October, 1877, Thompson made a general

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assignment to Helmer of all his property "in trust, to take possession of the same, and to sell and dispose of the lands and property, and to collect the choses in action, and with the net proceeds of such sales and collections, to pay and discharge all the debts and demands whatever then existing against said Thompson, whether due or to become due, provided the assigned property should be sufficient for that purpose; if insufficient, then to apply the same *pro-rata*, share and share alike, to the payment of such debts and demands according to their respective amounts. That in the schedule of said Thompson's creditors, contained in his inventory, made pursuant to chapter 466, Laws of 1877, was inserted the name of said Helmer as his creditor for \$6,000, 'for money loaned, secured by mortgage,' and among said Thompson's assets, and as a part thereof in said inventory were described the land so mortgaged to said Helmer, and at the end of each parcel so described was inserted this statement, 'mortgaged to Abiel E. Helmer to secure the payment of \$6,000, dated September 12, 1876, interest due on said mortgage from March 12, 1877.' "

Helmer "accepted the assignment, and entered upon said trust and still continues the same." On the 5th of April, 1878, as mortgagee, he transferred the bond and mortgage for a valuable consideration to the plaintiff. No part of the principal has been paid, nor any interest since March 12, 1877.

As conclusions of law the court find, *first*, that the bond and mortgage are usurious and void, and *second*, that the plaintiff is not entitled to any relief thereon as against Thompson, the mortgagor, or his property in the hands of his assignee, Helmer, and *fourth*, that judgment be rendered that the bond and mortgage be canceled and surrendered. The exception to the last clause of the second conclusion, and to the fourth conclusion of law, are, we think, well taken. For aught that appears the assignment was the voluntary and unsolicited act of the assignor, made in good faith for the purpose indicated by the instrument, viz.: "To make a fair and equitable distribution of his property and effects among his creditors." There is no finding, or request to find, to the contrary. A person

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agreeing to pay usury is not compelled to avail himself of the statute which permits him to annul the agreement; he may voluntarily do equity, and pay; or, actuated by an honest and conscientious intention, provide for payment of what he owes, and in that case a court of equity will, so far as it can, aid in carrying out the intent. He may also by his own act "deprive himself of the ability to inflict upon the creditor the loss of the entire debt." (KENT, Ch. J., in *Fanning v. Dunham*, 5 Johns. Ch. 122.) If sued upon the debt he makes default, the judgment stands good notwithstanding usury in the cause of action. (*Thompson v. Berry*, 3 Johns. Ch. 394, affirmed in 17 Johns. 436; *Bartholomew v. Yaw*, 9 Paige, 165.) So he may create a trust for the performance of his contract, although in itself incapable of being enforced, and this will be valid, and may be carried into effect, notwithstanding a defense exists to the original contract. (Fry on Specific Performance, § 312.) The author cites *Powell v. Knowler* (2 Atkyns, 224) which brought up an agreement in respect to certain lands, clearly champertous and illegal, but the party who was to convey, by will directed the agreement to be carried out, and created a trust for that purpose. It was held that the agreement could not be enforced, for the reason already mentioned, but that the trustee must execute the trust, and that amounted to the same thing — an enforcement of the agreement against the trustee who was directed to carry it out.

So, where a testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of a legatee, it was held that a debt, although usurious, and therefore not enforceable, must be deducted from the legatee's share. (*Stanton v. Knight*, 1 Simons, 482.) In *Denn, ex dem. Wilkinson, v. Dodds* (1 Johns. Cas. 158), it appeared that Wilkinson, the lessor, executed upon a usurious agreement, three certain mortgages to the defendant, and subsequently executed to one Fosdick a deed reciting these mortgages, and that, in consideration thereof, the sum of ten shillings paid by Fosdick, the said Wilkinson granted, etc., to him, the premises in said mortgages described, upon trust, first, to permit Wilkinson to sell

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the premises if he could before the first of May then next, and on receipt of the purchase-money satisfy and confirm the sale; but in case this was not wholly done by the time mentioned, then, upon trust, to sell the premises at auction and apply the moneys arising therefrom, or from sales made by the grantor, first, to the payment of the mortgage debts and interest thereon to the defendant, and next, pay a certain debt to Sleight & Co., and the surplus, if any, pay to the grantor. The plaintiff offered to show that the premises had been sold by the trustee and conveyed to the defendant, and relied upon the usury in the mortgages to invalidate his title; but the trial court held that the consideration mentioned in the deed of trust was sufficient to sustain it, and showed a title out of the lessor of the plaintiff and so nonsuited the plaintiff. The plaintiff moved to set aside the nonsuit upon the ground taken by him at the trial, viz., that the consideration of the conveyance to Fosdick, except as to the debt due Sleight & Co., was usurious, and the conveyance, therefore, void; and the debt to Sleight & Co. having been paid, there was no legal consideration to uphold the conveyance. On the other hand it was contended that the conveyance was not within the statute against usury, and of that opinion was the court, saying, this was an "absolute conveyance upon trusts, and operated as a payment or satisfaction of the debts mentioned in it, which debts, upon the performance of the trusts, would be discharged and extinguished. It was an act done in execution of the previous contracts by which the usurious debts were created and nothing but the trusts remained for the benefit of the grantor. An act of this nature cannot be rescinded on the ground of usury."

In *Murray v. Judson* (9 N. Y. 73), the plaintiff was a judgment creditor of one Judson, who had made an assignment of all his property for the benefit of creditors, preferring, in the first place, one Sheldon, in whose favor he had confessed judgment. The plaintiff sought to have the assigned property applied to his claim, upon the ground that the Sheldon judgment was usurious. The court were against him, holding that as the debtor could have paid the judgment, "no good reason

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can be assigned why he could not appropriate property for that purpose, and direct its application by a trustee. The assignment was not a contract with the holder of the judgment, or a mere security for that debt, but the setting apart of property for the payment of a specified demand in the order designated." This result follows from the fact that the assignment itself is irrevocable. It was voluntary. The assignor created his own trust, and a creditor who comes in to claim a share under it must be content to take such share of it as the assignor intended to give him.

This was held in *Pratt v. Adams* (7 Paige, 615). In that case a distinction is taken (page 642) between a general provision in such an assignment to pay debts and one where the debt is specifically named, viz.: in the first case a usurious debt cannot be paid, but in the other it should be to the extent only of the money actually loaned, and the legal interest thereon. So much, says the chancellor, "the creditor may claim, although the debt is tainted with usury." Now the debt owing from Thompson, the assignor, to Helmer, is as we have seen one of those directed to be paid from the property assigned, or if there is not enough for that purpose, then *pro rata* with the others. In *Murray v. Judson*, the decision was concurred in by all the members of the court, and *Pratt v. Adams* cited with approval. So far as I am aware neither case has been questioned, and they are decisive of the point now under consideration.

The right of the debtor to resist an action upon his obligation is not denied. But the result of establishing a trust was to convert the creditor into a *cestui que trust* and give him rights against a trust fund, which as a simple contract creditor he did not possess, and which did not belong to that relation — rights not to be enforced against the debtor, but the trust property, and adhering to that property until the debt is satisfied, or the property applied upon it according to the terms of the trusts; and so long as any debt named by the creditor of the trust remains unpaid, no part of the proceeds of that property can be applied, except to its payment, without a plain violation of the trust declared by the assignment. The cases cited

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by the respondent are not to the contrary. *Green v. Morse* (4 Barb. 332) denied the right of an assignee to refuse payment of a debt specifically provided for, because of its usurious character, and in this respect followed *Pratt v. Adams*. In *Strong v. Strickland* (32 Barb. 284), a mortgagor, who was also an assignor for the benefit among others of the mortgagee as a creditor, obtained a decree canceling and setting aside the mortgage on the ground of usury, but upon appeal it was so modified as not to "affect the claims of the mortgagee or assignee under the assignment." In *Morse v. Crofoot* (4 N. Y. 114), the bill was filed to procure the testimony of one Thayer and put an end to certain proceedings at law upon a note; the question now raised was not before the court. Thayer was an assignor, and his evidence was wanted to prove usury in the note; he was held incompetent because his testimony, if effectual, would put an end to the suit at law where he was a party, and avail him as well as the complainants. It may be inferred that the complainants were the assignees of Thayer, for the learned judge making the remark relied upon by the respondent here says: "If the complainants succeed in avoiding the note on the ground of usury, it will be their duty to refuse payment thereof out of the property in their hands." It was *obiter* and so was apparently considered by the same court in deciding *Murray v. Judson*, for it was cited by the judgment creditor "as conclusive" to show the assignment void by reason of the usury infecting the debt provided for, and, although not referred to by the court, was distinctly brought to their attention, without avail.

In *In re Lewis* (81 N. Y. 421, 424), the court do indeed say that "the assignee is the representative of the debtor," but it is added, "he must be governed by the express terms of his trust," and the whole opinion is to show that he has no power outside of its provisions, and that the control of the court is limited in the same way. Neither can the assignor modify or change its provisions. This is held in *Murray v. Judson*; but if he can defeat a claim once provided for, so as to exclude

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it from participating in the fund raised by the assignment, the rule would be of little force. Indeed, a reservation to the assignor of any power or control over the provisions of the instrument itself, or the property assigned by it; or the appropriation of its proceeds, would be fatal to its validity. (*Riggs v. Murray*, 2 Johns. Ch. 565; *Grover v. Wakeman*, 11 Wend. 187; *Boardman v. Halliday*, 10 Paige, 223.) The assignee does not take by contract or agreement with the debtor, but by appointment. As the parties cannot change the terms of the instrument, they cannot withdraw the property or the trusts from the jurisdiction of the court, nor absolve the assignee from its control. If he resigns the assignor cannot appoint a successor. The appointment must be by the court. The execution and delivery of the instrument excludes the grantor from any further dominion over it or its subject-matter.

Nor is it within the statute which avoids contracts or securities by reason of usury (Tit. 3, § 2, chap. 4, 1 R. S. 772), for it is "a mere trust or appropriation of property made by the debtor, without the agency of the creditor, subsequent to and independent of the usurious contract as a means of satisfying the debt after it has been incurred." (*Murray v. Judson*, *supra*.) The fact that the creditor whose claim is sought to be avoided is the assignee does not give him a relation to the property or the debtor, different from that of any other person who might have been designated for the office. He has no right independent of the assignment, and is in all things subject to the court.

The plaintiff in this case, the assignee of the bond and mortgage, as to any claim under the assignment, stands in place of the creditor, and the judgment appealed from should be modified by a declaration that it shall not affect the claim of the assignee or holder of the bond and mortgage under the assignment, and as thus modified affirmed, without costs to either party in this court.

All concur, except MILLER and TRACY, JJ., absent.

Judgment accordingly.

Statement of case.

HENRY AUERBACH, Appellant, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

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Plaintiff on September 21, 1877, purchased in St. Louis a ticket for a passage from that city to New York over the several railroads mentioned in coupons annexed. It was specified on the ticket that it was "good for one continuous passage to point named in coupon attached;" also that the company selling the ticket acted only as agent for the other roads, and assumed no responsibility beyond its own line, and that the holder of the ticket agreed with the several companies "to use the same on or before" September 26, and if he failed so to do, either of the companies might refuse to accept the ticket and demand full fare. Plaintiff left St. Louis on the day he bought the ticket; he stopped over at Cincinnati and at Cleveland; he reached Buffalo the 24th having used all the coupons except one entitling him to passage over defendant's road; he stopped there a day and then purchased a ticket from Buffalo to Rochester, where he remained until the afternoon of the 26th when he took passage for New York. He presented his ticket to the conductor; it was accepted and punched several times, but when the train reached Hudson, about 3 A. M., September 27, the conductor declined to recognize the ticket, and upon plaintiff's refusal to pay fare to New York, ejected him from the car. On the trial of an action to recover damages, after proof of these facts, plaintiff was nonsuited. *Held* error; that the contract evidenced by the ticket was not by any one company, or jointly by all the companies named, but was a separate contract by each company for a continuous passage over its road; that plaintiff was not bound to commence his passage on defendant's road at Buffalo, but could commence it at any intermediate point between that city and New York, being only required when commenced, to make it continuous; that plaintiff having commenced his passage on the 26th, having presented his ticket and the same having been accepted, it was then used within the meaning of the contract, and as it was not specified that the passage should be completed on that day, he was entitled to go through on the ticket. //

(Argued May 1, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 3, 1881, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

Opinion of the Court, per EARL, J.

Morris J. Hirsch for appellant.

Frank Loomis for respondent. The ticket was a contract under which the plaintiff was entitled to be carried from St. Louis to the "point named in coupon attached," by a continuous passage, to be made before the expiration of September 26. (*Barker v. Coflin*, 31 Barb. 556; *Boice v. Hudson R. R. Co.*, 61 id. 611; *Gale v. D., L. & W. R. R. Co.*, 7 Hun, 670; *Terry v. Flushing, N. S. & C. R. R. Co.*, 13 id. 670; *Elmore v. Sands*, 54 N. Y. 512; *Hill v. S. B. & N. Y. R. R. Co.*, 63 id. 101.) The stipulation that the passage should be continuous, construed most favorably to the plaintiff, meant continuous as between the termini of the different roads, and of course between Buffalo and New York, and neither the suggestion of defendant's conductor that the plaintiff pay the fare from Buffalo to Rochester, nor the acceptance of the ticket at Rochester, and from thence eastward, worked a waiver of this stipulation. (*Hill v. S. B. & N. Y. R. R. Co.*, 63 N. Y. 101.)

EARL, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was nonsuited at the trial and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows: The plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached;" that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of Sep-

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tember then instant, and that, if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and staid there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows :

“Issued by Ohio and Mississippi railway on account of New York Central and Hudson River railroad *one first-class passage, Buffalo to New York.*”

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September, he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched several times, until the plaintiff reached Hudson about three or four o'clock, A. M., September 27, when the conductor in charge of the train declined to recognize the ticket on the ground that the time had run out, and demanded three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

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We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. (Hutchinson on Carriers, § 579; *Brooke v. The Grand Trunk Railway Co.*, 15 Mich. 332.)

But the plaintiff was bound to a continuous passage over the defendant's road, that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train, and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff, having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the af-

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ternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent. ANDREWS, Ch. J., concurring in result.

Judgment reversed.

AUGUSTA W. BATES, Respondent, v. THE FIRST NATIONAL BANK OF BROCKPORT, Appellant.

In an action by plaintiff, a married woman, to recover the amount of certain deposits, she proved that she indorsed and delivered to her husband two checks belonging to her, and payable to her order, for the purpose of having the same deposited, in her name, with the defendant. She then produced a bank-book in the usual form, in which the amount of the checks was credited to her as depositor. Defendant offered to show in substance that at the time of the first deposit it was orally agreed between plaintiff's husband and defendant, that the deposit should be made to defendant's credit, on condition that the same might be withdrawn by the husband on check drawn by him in plaintiff's name; that the second deposit was also made under a similar agreement, and that the deposits were subsequently so withdrawn. This was objected to and excluded. *Held* no error; that the request of the husband to have the deposit made in the name and to the credit of plaintiff, and a pass-book issued to her, taken in connection with the checks made payable to her, sufficiently disclosed the agency of the husband; that authority to sign his wife's name to future checks could not be inferred from the fact of his making the deposits; and defendant could not prove an arrangement with him hostile to her interests and beyond the apparent scope of the agency, without proof of actual authority from her.

(Argued May 1, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiff, entered upon an order made December 31, 1880, which denied a motion for a new trial and directed judgment on a verdict. (Reported below, 23 Hun, 420.)

This action was brought to recover the amount of certain deposits alleged to have been made by plaintiff with defendant.

The facts disclosed by plaintiff's evidence were substantially as follows:

The plaintiff received from the administrator of her father's estate, by checks signed by him as administrator and payable to her order, two separate sums of \$500 each. She indorsed the first check in blank and delivered it to her husband, Gustavus

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Bates, with directions to take it to the defendant's bank and deposit the amount in her name and bring back a pass-book. He took the check to the banking office of the defendant which made out a pass-book with the following entry therein :

"FIRST NATIONAL BANK OF BROCKPORT IN ACCOUNT WITH
AUGUSTA W. BATES.

| | |
|------------------------|------------|
| <i>Dr.</i> | <i>Cr.</i> |
| May 2, 1874,.....\$500 | " |

There was no other writing or printing in the pass-book. This book was brought back from the bank and delivered to plaintiff by her husband. Plaintiff also indorsed the second check in blank and gave it to her husband with her bank-book and with instructions to deposit it in her name and for her. He took the pass-book and brought it back to her on the same day, the bank having entered therein another credit to her like the first, as follows: "May 14, \$500," and the same was produced in evidence.

Defendant offered to prove by its teller that on the 2d of May, 1874, Gustavus Bates, the husband, came to the banking office of the defendant with the first of the above-mentioned checks and deposited the same in pursuance of an agreement made between him and the teller acting for the bank, that the money specified in the check should be deposited to the credit of the plaintiff, with the condition that the same should be withdrawn upon checks made by Bates in her name, and that the same was subsequently so withdrawn. Upon the objection of the plaintiff's counsel the court ruled that the evidence was competent and material, provided the counsel for the defendant expected to follow it with any evidence of the agency of Mr. Bates to sign checks in the name of his wife, or of the wife's permission to the husband to withdraw the money in his own name or in her name ; or if the counsel for the defendant expected to follow it with any evidence of ratification by the plaintiff of the act of withdrawal of the money. The defendant's counsel thereupon stated that he offered the evidence irrespective of the

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fact of such agency or any subsequent ratification, and upon the sole ground of the husband's contract with the teller, made at the time and constituting a part of the contract, and thereupon the court sustained the objection, to which the defendant's counsel excepted. The defendant then offered to prove that at the time of the second deposit, Bates came to the bank with \$500 in currency, which was deposited with the like oral agreement, and that the amount was withdrawn by Gustavus Bates, upon a check made by him in the name of the plaintiff, the same statement being made by the counsel as to the agency and ratification. The evidence was, upon objection made by the plaintiff's counsel, rejected.

The jury under the direction of the court rendered a verdict for plaintiff for the amount of the two deposits.

William F. Cogswell for appellant. Defendant had a right to prove that the deposits were made on an oral agreement with plaintiff that the money should be drawn out on checks made by plaintiff or by her husband in her name, and that the same was all drawn out by checks of the husband in his wife's name. (*Hotchkiss v. Mosher*, 48 N. Y. 478; *Gage v. Jaquith*, 1 Lans. 207; *Felkin v. Whyland*, 24 N. Y. 338; *Terry v. Wheeler*, 25 id. 520; *Brewers' F. Ins. Co. v. Binger*, 10 Hun, 56; *McArthur v. Soule*, 5 id. 63.)

J. D. Decker for respondent. One authorized to receive checks in payment for his employer, while engaged in the transaction of his employer's business, has no authority to indorse his employer's name on such check, where payable to his order and not negotiable, and in doing so and transferring the checks, the transferee gets no title and is liable to the owner. (*Robinson et al. v. The Chemical Nat. Bk.*, 13 Weekly Dig. 152; 10 id. 315; *Talbot v. Bk. of Rochester*, 1 Hill, 295; *Johnson v. First Nat. Bk.*, 6 Hun, 124; *Craighead v. Peterson*, 72 N. Y. 283.) A principal is not bound by the acts of his agent in excess of his authority, where the party dealing with him has not the right to believe that the agent was acting within his authority. (*Welsh v. Hartford Ins. Co.*, 73 N. Y. 10; *Mechs.*

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Bk. v. N. Y. & H. R. R. Co., 13 id. 631; 64 id. 446; 25 id. 296.) Any special contract or arrangement which defendant made with plaintiff's husband not within his actual or apparent authority, or which is apparently or openly in violation of and outside his authority, is at the risk of the defendant, and not binding on the plaintiff. (18 Wend. 497; 5 Johns. 57; 15 id. 54; 16 N. Y. 134; 6 Mann. Gr. & S. 766; 7 Barn. & Cres. 278; 2 Johns. 48; 7 id. 390; 3 Term R. 757; 3 Hill, 262; Story on Agency, 17.) Neither declarations nor oral agreements are admissible to contradict or qualify the plain terms and legal intendment of a writing governing the transaction. (4 Seld. 404; 53 N. Y. 391; 49 id. 395; 39 id. 214; 3 Hand, 319; 5 Lans. 493; 4 N. Y. 491; 48 id. 391; 12 id. 464; 38 id. 121; 46 id. 86; 7 Mass. 107; *Rich v. Niagara Svgs Bk.*, 3 Hun, 483.) The entry of the names on the signature-book formed no part of the contract of deposit. (*Pardee v. Fish*, 60 N. Y. 268; *Barnes v. Ontario Bk.*, 19 id. 152; *Miller v. Austin*, 13 How. [U. S.] 218, 228; *Bk. of Orleans v. Merrill*, 2 Hill, 295.) The defendant had constructive notice that the money deposited was plaintiff's property. (*Mechs. Bk. v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 632-7; *Dun v. Hornbeck*, 72 id. 89; *Higgin v. Bush*, 12 Johns. 306; *The Schooner Freeman et al. v. Buckingham*, 18 How. 182; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; 18 id. 551; 16 N. Y. 150; *Allen v. Williamsburgh Svgs Bk.*, 69 id. 318-319; *Boone v. Citizen's Svgs Bk.*, 84 id. 38; 25 id. 295-8; 23 id. 455-464; 29 id. 249; 13 id. 631-4.) The acts or declarations of an agent are not evidence of his authority, or of the existence of the agency, and cannot be given in evidence to establish that fact. Evidence *aliunde* must be adduced to establish the authority (13 N. Y. 632; 52 id. 273; 3 Hun, 352; 23 id. 463; 65 Barb. 165; 1 Lans. 1.) If the defendant's pass-book did not represent the real fact or truth, it would be a breach of good faith, and an act of injustice to allow defendant to show that fact, in bar of plaintiff's right to call upon the defendant for the money as represented by its pass-book.

Opinion of the Court, per FINCH, J.

(*Cont'l N. Bk. v. N. Bk. of Comm.*, 50 N. Y. 582-5; *Voorhees v. Olmsted*, 3 Hun, 754; *West v. First Nat. Bk.*, 20 id. 412-14; *Gaylord v. VanLoan*, 15 Wend. 308; *Mad. Ave. B. Ch. v. Oliver St. B. Ch.*, 73 N. Y. 90; *Bissell v. R. R. Co.*, 22 id. 279; *Rice v. Dewey*, 54 Barb. 455; 50 N. Y. 582-3; 30 id. 226.) The evidence was not admissible as a part of the *res gestæ*. (*N. River Bk. v. Aymar*, 3 Hill, 262; *Higgins v. Moore*, 34 N. Y. 417; *Walbridge v. Kilpatrick*, 3 Weekly Dig. 577; *Meiggs v. Same*, 15 Hun, 453; *Nash v. Mitchell*, 71 N. Y. 201; *White v. Miller*, id. 136; *Nixon v. Palmer*, 4 Seld. 398; *Rossita v. Same*, 8 Wend. 497; *Nixon v. Hyzeroth*, 5 Johns. 57; *Gibson v. Colt*, 7 id. 390; *Batty v. Carswell*, 2 id. 48-50; *Fern v. Harrison*, 3 Term R. 757; *East India Co. v. Hensley*, 1 Esp. 111; *Searles v. Curtiss*, 9 Weekly Dig. 195; *Hydorn v. Cushman*, 16 Hun, 108; *Bumstead v. Hoadley*, 11 id. 488; *Booth v. Cleveland R. M. Co.*, id. 280; *Howard v. Upton*, 9 id. 436; *Manning v. Keenan*, 73 id. 50; *Estevez v. Purdy*, 66 id. 448; *Luby v. H. R. R. Co.*, 17 id. 133; Story on Agency, § 77, p. 165.)

FINCH, J. The evidence excluded upon the trial was admissible, if at all, upon the assumption that the husband, who brought the fund for deposit, was either its real owner, or entitled to be dealt with as such by the bank. In such event he could have dictated the terms of the deposit and the manner of its withdrawal, and the bank accepting the arrangement, and acting upon vouchers made accordingly, could have reasonably expected protection. But if the husband came as agent, and not as owner, or the attending circumstances were such as to charge the bank with knowledge of his real relation to the fund, an arrangement hostile to the safety of the principal, and beyond the apparent scope of the agency, drew after it the peril attaching to a want of actual authority.

The first deposit was of a check drawn by an administrator, payable to the order of the wife, and indorsed by her so as to give title to the holder. So far, the possession of the husband was consistent either with an ownership or an agency, and the bank was not bound to infer the latter. But the husband re-

quested the deposit to be put in the name and to the credit of the wife, and a pass-book to be made for delivery to her, showing her to be the real depositor. This request fairly disclosed the agency. Taken in connection with the check payable to the wife's order, it plainly indicated that the money was hers, intrusted to the agent for the purpose of a deposit to her credit. Had the transaction stopped here, no mistake as to its purport would have been possible, and the bank would have been bound to recognize the wife as owner, and pay only upon her order. But the further condition was imposed upon the deposit that the husband should be at liberty to withdraw it upon checks signed by him in his wife's name. On its face the complete proposition was an inconsistency, suggestive of a possible fraud, and out of the usual and ordinary course of business. It was inconsistent, because the bank was asked at the same moment to treat the wife as owner and depositor, and as neither, and so give to her an apparent credit which was in truth a delusion. It was suggestive of fraud, because while assuring her of the safe disposal of her money, and the honest fulfillment of the agency she had created, it enabled her credit to be stolen away without her knowledge, and disclosed plain traces of duplicity and equivocal purpose. It was out of the usual and ordinary course of business. If the money had been the husband's, and he had merely wished to enable his wife to draw on it at will, he would naturally have deposited it to his own credit and given her his checks, or authorized the bank to accept hers. If, on the other hand, as the bank was fairly warned, the money was hers, and she desired her husband to draw upon it freely, she would have given him her checks, or sent an order to accept his. When the bank was tendered a deposit upon conditions such as we have described, and with such knowledge as the circumstances tended to impart, its duty was to refuse the deposit or require the assent of the wife. Omitting to do so, it took the risk of the actual truth, and paid the unauthorized checks at its peril. Any other rule would permit a bank to be blind when it ought to see, and furnish dangerous facilities for fraud. In the

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present case just that happened which might easily have been foreseen. The husband drew his wife's money upon fraudulent vouchers, with such aid from the bank as made it liable for the consequences. The husband's possession of the money did not authorize it to infer authority to sign the wife's name to future checks. It relied upon the husband's honesty without inquiry as to the fact, and must take the risks of its reliance. Its pass-book was something more than a mere receipt. It imported, besides, a promise to pay on demand, and so had in it elements of contract. The bank made the wife its depositor, whom it was bound to protect against vouchers not known to be actually hers. It established a relation which it was required to respect so long as it existed, and from the duties of which it could not escape without her real authority. It trusted the husband beyond the scope of his apparent authority, and must bear the consequent loss. The evidence offered would not have constituted a defense, and was, therefore, properly excluded.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., absent, and DANFORTH, J., who took no part.

Judgment affirmed.

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| 89 | 399 |
| 122 | 72 |
| 89 | 292 |
| 147 | 651 |

ENOCH MORGAN'S SONS COMPANY, Respondent, v. BENJAMIN F. TROXELL et al., Appellants.

Where there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color and general appearance of the packages may be material; but a party cannot appropriate an ordinary and usual form of package and fashion of label, and exclude others from its use, or the use of any thing resembling it; to sustain an action restraining such use there must be an imitation of something that can legally be appropriated as a trade-mark.

The mere idea represented by some figure, on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated as a trade-mark.

An action cannot be maintained to restrain a defendant from selling his own goods in packages and with labels he has a legal right to use, and

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which do not infringe upon any trade-mark of the plaintiff, because of fraudulent representations and devices on the part of defendant to palm off his goods as those of the plaintiff.

Plaintiff prepared and sold a soap for cleaning and polishing, which was put up in square cakes, wrapped in paper coated with tin-foil, with a band of blue paper about it on which, on one side of the package, is printed in gold letters the label, "Sapolio, for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West street, New York." On the other side, "Enoch Morgan's Sons' Sapolio," with the device of a human face opposite to and reflected in a pan. Defendant thereafter prepared and sold a soap put up in cakes of a different shape from those of plaintiff, wrapped in tin-foil, with a band of blue paper; on one side printed in large, gilt letters, Troxell's Pride of the Kitchen Soap," then a small figure of a monkey looking at some indistinct object held in his hand, on each side of which is the word "trade-mark," and below in small letters the words, "scouring and polishing." On the other side is printed in large letters, the words, "Pride of the Kitchen Soap," and six lines in small letters describing its uses. *Held*, that the facts did not show any infringement of a trade mark and that an action was not maintainable to restrain defendants from so preparing and selling their soap.

E. M.'s Sons' Co. v. Troxell (23 Hun, 632), reversed.

(Argued May 8, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made February 4, 1881, which affirmed a judgment, in favor of plaintiff, entered upon the report of a referee. (Reported below, 23 Hun, 632.)

This action was brought to restrain defendant from an alleged infringement upon plaintiff's trade-mark.

The material facts are stated in the opinion.

E. More for appellants. Defendants cannot be restrained in the use of their trade-mark, although it has a general resemblance to plaintiff's, as they have neither copied nor simulated plaintiff's, nor appropriated any thing they had not a right to. (*Amoskeag Case*, 2 Sandf. 606, 608; 58 N. Y. 233; *Gillott v. Easterbrook*, 47 Barb. 455; *Wolfe v. Burke*, 56 N. Y. 115, 122; 7 Lans. 151; Brown on Trade-marks, §§ 271-2; *Faber v. Faber*, 2 Abb. [N. S.] 115; *Falkenburgh v. Lucy*, 35 Cal. 52; Coddington on Trade-marks, §§ 19, 159; *Blackwell v. Wright*,

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73 N. C. 310; L. R., 41 Chy. 359; 46 id. 707; 42 L. T. Rep. [N. S.] 857; *Cook v. Starkweather*, 13 Abb. Pr. [N. S.] 392; *Moorman v. Hoge*, 2 Sawyer, 78; High on Injunctions, p. 400, § 690; *Frese v. Buchaf*, 13 Off. Gaz.; 17 Barb. 608; 4 Abb. 114; 61 N. Y. 74; 35 Cal. 52; 44 Mo. 173; L. R., 13 Chy. Div. 181; *Enoch Morgan's Sons v. Schwackhoffer*, 55 How. 38.) Where there is a partial infringement, where defendant has attempted to imitate something which was plaintiff's exclusive property, the rule, as applicable to shelf goods, is that the purchasers must read the label, unless it is sold and known by the mark. (1 How. App. Cas. 558; 2 Sandf. Ch. 625; 11 H. of L. Cases, 36 L. J. 504; *Coleman v. Crump*, 70 N. Y. 578.) If defendants' package is fair competition the judgment cannot be sustained, either as to the damages or injunction, on the outside pretense that they caused their goods to be sold as plaintiff's. (*Matthews v. Coe*, 49 N. Y. 61.)

Samuel Hand for respondent. A manufacturer of a valuable commodity, who affixes any *indicia* thereto, whereby the genuineness of its origin is assured, thereby becomes vested with an exclusive right to use such *indicia* in the sale of such commodity. (*Colladay v. Baird*, 7 Upp. Can. L. J. 132; *McAndrews v. Bassett*, 10 L. T. [N. S.] 442; *Appolinaris Co. v. Norris*, 23 id. 242.) The character of the mark is not of judicial prescription. Whatever the manufacturer first appropriates, a court of equity will protect. (*Wotherspoon v. Currie*, 27 L. T. [N. S.] 303; *Coleman v. Crump*, 70 N. Y. 573; *Enoch Morgan's Sons' Co. v. Schwachofer*, 55 How. 37; *Same v. Troxell*, 23 Hun, 632; *Perry v. Truefitt*, 6 Beav. 66; *Coats v. Holbrook*, 2 Sandf. Ch. 594; *Williams v. Johnson*, 2 Bosw. 6; *Cook v. Starkweather*, 13 Abb. Pr. [N. S.] 392; *Popham v. Wilcox*, 38 N. Y. Sup. Ct. 280.) If a trade-mark may be constituted of labels, names, marks, letters, symbols, form, appearance, color, style, rim, glazed or shellacked preparations, packages, cases and vessels, then such mark is infringed by the use of any such marks thereof, *a fortiori* may it be infringed by the use of that which is the most con-

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spicuous and striking portion thereof. (*Hostetter v. Vanwin-
kle*, 1 Dill. 329; *Wotherspoon v. Currie*, 27 L. T. [N. S.] 303;
Taylor v. Carpenter, 3 Story, 548; *Braham v. Bustard*, 9
L. T. [N. S.] 199; *Woolman v. Ratcliff*, 1 H. & M. 259;
Amoskeag Co. v. Spear, 2 Sandf. Sup. Ct. 599.) The question is,
would the public be deceived? (*Thompson v. Laight*, 18 Beav.
164; *Walton v. Crowley*, U. S. C. C., S. D. N. Y., 3 Bl. C. C.
440; *Clark v. Clark*, 25 Barb. 76; R. Cox, 206; *Colton v.*
Thomas, 7 Phila. 257; 2 Brewst. 308; R. Cox, 507; *Filley v.*
Fassett, 44 Mo. 173; R. Cox, 538; 8 Am. L. Reg. [N. S.]
402; *Popham v. Wilcox*, 14 Abb. Pr. [N. S.] 206; *Coleman*
v. Crump, 8 J. & S. 548; 70 N. Y. 573; 16 Alb. L. J. 352;
McLean v. Fleming, 96 U. S. [6 Otto] 245; 13 U. S. Pat.
Gaz. 913; *Hennessey v. White*, 6 W. W. & A. B. Eq. 216,
221; *Swift v. Dey*, 4 Robt. 611; R. Cox, 319; *Boardman v.*
The Meriden B. Co., 35 Conn. 402; R. Cox, 490; *Moses v.*
Sargood, Ewing & Co., Nov. 22, 1878.) Absolute identity is
not required. (*Seixa v. Provezende*, L. R., Ch. 192; 12 Jur.
[N. S.] 215; 14 L. T. [N. S.] 314; 14 W. K. 357; *Bradley v.*
Norton, 33 Conn. 157; Cox, 331; *Barrows v. Knight*, 6 R. I. 434,
Cox, 238; *Harrison v. Taylor*, 11 Jur. [N. S.] 408; 12 L. T. [N.
S.] 339; *Wotherspoon v. Curree*, L. R., 5 H. of L. 508; 42 L. J.
Ch. 130; 27 L. T. [N. S.] 393; 22 id. 260; 18 Weekly Rep.
562; 42 L. J. Ch. 130; 23 L. T. [N. S.] 443; 18 Weekly
Rep. 942; L. R. 5 H. of L. 517; *Stephens v. Peel*, 16 L. T.
[N. S.] 145; *Sohl v. Geisendorf*, Wilson [Ind.], 60; *Meriden*
B. Co. v. Parker, 39 Conn. 450; 12 Am. Rep. 401; 13 Am.
L. Reg. [N. S.] 153; *McLean v. Fleming*, 96 U. S. [6 Otto]
245.) In cases where it appears that the defendant has adopted
the plaintiff's trade-mark, and it is proved that the defendant's
object in doing so was to pass off his own goods as those of the
plaintiff, the court will, without further inquiry, restrain the de-
fendant. (*Hope v. Evans*, 30 L. T. [N. S.] 204.) The court
will also restrain a defendant where there has been such de-
ception, although proof of the defendant's object be wanting,
if it appears that any one has in fact been deceived, being
thereby induced to buy the defendant's goods as being the

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goods of the plaintiff. (*Colman v. Crump*, 70 N. Y. 578; *Saizo v. Provezende*, 14 L. T. [N. S.] 314; *Edelsten v. Vick*, 11 Hare, 78; *Taylor v. Taylor*, 53 L. J. Ch. 225; *Enoch Morgan's Sons' Co. v. Schwachofer*, 55 How. Pr. 37; 17 Alb. L. J. 238; L. J. Notes of Cases, 1867, 134; *Lea v. Wolf*, 13 Abb. [N. S.] 389; *Godillott v. Hazard*, 49 How. 9; *Popham v. Wilcox*, 38 N. Y. Sup. Ct. 280; 66 N. Y. 74; *Lockwood v. Bostwick*, 2 Daly, 521; *Kinney v. Basch*, 16 Am. L. Reg. 597; Coddington's Dig. of Trade-marks, 411.) Plaintiff is entitled to an injunction against the defendants, for the reason that their sales tend to deceive the public and to produce a confusion of goods. (*Woodlam v. Ratcliff*, 1 H. & M. 259; *Amoskeag Co. v. Spear*, 2 Sandf. 399; *Wolfe v. Hart*, 4 Vict. [Australia] L. R., Eq. 125; *Perry v. Treffitt*, 6 Beav. 73; *Bininger v. Wattess*, 28 How. 207; *Wolf v. Goulard*, 18 How. Pr. 64; *Burgess v. Burgess*, 17 L. & E. 257; *Amoskeag Co. v. Spear*, 2 Lond. S. C. 599; *Fettridge v. Wells*, 13 How. 385; *Leighton v. Bolton*, 3 Dow. 293; *Merrimack Co. v. Garner*, 4 E. D. Smith, 487; *Croft v. Daly*, 1 Beav. 84; *Corwin v. Daly*, 7 Bosw. 222.) The fact that the two labels appear different on comparison of the infringement with the genuine is, of itself, no defense. (*Lockwood v. Bostwick*, 2 Daly, 521; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. [Penn.] 321; Philadelphia Legal Gazette, April 8, 1870; *Swift v. Dey*, 4 Robt. 612-13; *Millington v. Fox*, Myl. & Cr. 353; *Coffeen v. Brunham*, 4 McL. 516; *Knott v. Morgan*, 2 Keen. 213.) Plaintiff was not guilty of laches. (*Taylor v. Carpenter*, 2 Woodb. & M. 1; *Amoskeag Co. v. Spear*, 2 Sandf. 599; *Rogers v. Nowill*, 22 L. J. [N. S.] Ch. 404; 17 Eng. L. & Eq. 83; S. C., 17 Jur. 109; *Gillott v. Esterbrook*, 48 N. Y. 374; 47 Barb. 445; *Wolf v. Barnett*, 24 La. Ann. 97; *Lazenby v. White*, 41 L. J. [N. S.] Ch. 354; *Taylor v. Carpenter*, 2 Woodb. & M. 120; *Rodgers v. Rodgers*, 31 L. T. [N. S.] 285; *McLean v. Fleming*, 6 Otto, 1; *Harrison v. Taylor*, 11 Jur. [N. S.] 408; *Moet v. Couston*, 3 Beav. 580; *Edleston v. Edleston*, 1 De G. [N. S.] 185; *Estcourt v. Estcourt*, L. R., 1 Ch. 276.)

Opinion of the Court, per RAPALLO, J.

RAPALLO, J. Specimens of the packages and labels used by the plaintiff, and of those used by the defendants, and which are claimed to be an infringement of the plaintiff's trade-mark, have been submitted to our inspection, and we are clearly of opinion that there is too great a dissimilarity between the two to sustain the judgment in this case. The only points of similarity between the two articles sold are, that they are both small cakes of soap covered with tin-foil or tinned paper, and having a blue band around them, with gilt lettering. The cakes are not even of the same shape, one being nearly square, and the other an oblong. But we are of opinion that this form of package, with a blue band and gilt lettering, could not be appropriated by the plaintiff as a trade-mark. There is nothing peculiar about it, and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade-marks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label, and exclude every one else from its use, or from the use of any thing resembling it. If it had, the different forms and fashions of cigar-boxes, packages of chewing tobacco, perfumery, canned goods, and other small articles, and the color or style of labels which every dealer according to his taste adopts or selects from those in use, would afford food for litigation, sufficient to give constant occupation to the courts.

All these articles of each class bear a general resemblance to each other, and the products of the different dealers can be distinguished only by the brands, marks, or names which they may put upon them, and these can be protected as trade-marks only so far as they are new and comply with the other conditions necessary to constitute a trade-mark.

When there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color, and general appearance of the packages may be material, but to sustain an action there must be an imitation of something that can legally be appropriated as a trade-mark. When we come to look at the brands or contents of the labels, they are entirely different. The label of the plaintiff on one side of the package is "Sapo-

Opinion of the Court, per RAPALLO, J.

lio for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West street, New York," and on the other side, "Enoch Morgan's Sons' Sapolio," with a well-drawn figure of a human face opposite a pan, and reflected in it.

The label of the defendants does not bear the slightest resemblance to this, except that it is blue paper, with gilt lettering; it is different in shape, and the wording is on one side in large letters, "Troxell's Pride of the Kitchen Soap," the words "Scouring and Polishing" being printed at the bottom in small letters. On the other side is printed in large letters, "Pride of the Kitchen Soap," under which are six lines in small letters describing its uses. The only mark upon the defendants' packages which presents even an idea similar to that of the plaintiff, is a very small figure of a monkey, sitting down, tail in the air, and looking at something which he holds in his hand, which may be supposed to be a mirror, or pan, or some bright article, but so diminutive as not to be at all conspicuous, and entirely different in appearance from the distinct and well-drawn figure printed on the plaintiff's label, and on each side of the monkey is the word, "Trade-mark," in very small letters. The dissimilarity in these figures is much greater even than that of the hogs in *Popham v. Cole* (66 N. Y. 74; 23 Am. Rep. 22). The mere idea represented by some figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark. The figure by which that idea is sought to be conveyed may perhaps be adopted, but in this case there is no similarity whatever in the figures.

If, as we think, there was no imitation of any trade-mark of the plaintiff, the judgment cannot be sustained on the ground of fraudulent representations, or devices on the part of the defendants to palm off their goods upon individuals as the goods of the plaintiff. What remedy there is for such a wrong if proved, it is not necessary now to inquire, but the remedy clearly is not to restrain the defendants from selling their own goods in packages and with labels which they have a legal right to use, and which do not infringe upon any trade-mark of the plaintiff.

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The judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur, except MILLER and TRACY, JJ., absent.

Judgment reversed.

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| 89 | 300 |
| 123 | 412 |

AMARIAH H. BRADNER et al., Respondents, v. PETER O. STRANG et al., Appellants.

Prior to March 27, 1875, plaintiffs, who were partners doing business at Rochester, had had extensive business transactions with defendants, who were commission merchants in New York, and the parties had been in the habit of exchanging credits. Plaintiffs had sent to the defendants four notes to take up other paper about maturing, which notes defendants had negotiated and used. On that day defendant S. wrote to plaintiffs, stating in substance that they had not used said notes and had themselves paid the paper they were given to renew. And on April 2, 1875, said defendant wrote again asking for four other notes. These plaintiffs sent in reliance upon the statements that the other notes had not been used. Defendants received, and negotiated them using the proceeds. Soon after defendants failed; petitions in bankruptcy were filed against them and they were discharged, being then indebted to plaintiffs on all their accounts and transactions about \$1,000 aside from the proceeds of the four notes, which having passed into the hands of *bona fide* holders, plaintiffs were obliged to pay. In an action to recover damages because of the false representation, *held* that plaintiffs were entitled to recover; that the representation was material; that defendants H., although not participants in the fraud, were liable *civiliter* therefor as it was perpetrated by their copartner in the transaction of the partnership business; and that the discharge in bankruptcy was no defense.

Hennequin v. Clews (77 N. Y. 429; 33 Am. Rep. 641) and *Neal v. Clark* (95 U. S. 704), distinguished.

Also *held*, that the state of the accounts between the parties at the time the last notes were sent was material only as bearing upon the *quantum* of damages.

Also *held*, that plaintiffs were properly allowed to testify that they sent the last notes in reliance upon said representations; and that a refusal to permit the defendants H. to testify that they did not have any intention to defraud was not error; nor was a refusal to allow defendants to testify for what purpose the last four notes were obtained.

On June 30, 1875, before the notes last sent became due, defendants rendered to the plaintiffs an account, in which the latter were credited with the proceeds of said notes, which account, although with knowledge of the

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fraud, they retained down to the commencement of this action. *Held*, that as the damage did not arise until afterward, when plaintiffs were compelled to pay the notes, the fraud was not condoned or waived by the retention of the account, nor were plaintiffs barred thereby of their right to recover.

Plaintiff B. testified, without objection, that a few months after the failure he was told by defendant S. that when he got his discharge he would have the ability and disposition to make an honorable settlement with plaintiffs. Defendants' counsel requested the court to charge the jury to disregard such evidence. The court made no mention of it in its charge. *Held*, that the evidence was immaterial and the refusal to grant the request was not error.

It seems that if the evidence was regarded by defendants' counsel as prejudicial, it should have been objected to when offered.

(Argued May 3, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 31, 1880, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 23 Hun, 445.)

The nature of the action and the material facts are stated in the opinion.

George H. Forster for appellants. The representation that the notes were not used was not a material representation, nor did it affect the substance of the contract made in sending the notes sent in April. The mere untruth of the representation would not constitute a fraud had it been untrue. (*Johnson v. Taber*, 10 N. Y. 319; *Whitney v. Allaire*, 1 id. 305.) The plaintiffs must establish not merely the representation and its falsity, but that they relied on it and were deceived thereby, and also that the false representation was of some matter or thing material to the matter in and about which it was made. (*Masterton v. Beers*, 1 Sweeney, 406; *Dambman v. Schulting*, 75 N. Y. 55.) There is no ingredient of fraud in the case. (*Marsh v. Falker*, 40 N. Y. 566; *Meyer v. Amidon*, 45 id. 169; *Oberlander v. Spiess*, id. 175; *Wakeman v. Dalley*,

Opinion of the Court, per EARL, J.

51 id. 27; *Stitt v. Little*, 63 id. 427; *Moore v. Ryder*, 65 id. 441.) A guilty intent was essential to plaintiffs' right to recover. (*Stitt v. Little*, 63 N. Y. 427, 433.) The court erred in charging that the defendants Holland were liable civilly in this action, notwithstanding their discharge in bankruptcy. (U. S. R. S., § 5117; *Hennequin v. Clews*, 77 N. Y. 429; *Palmer v. Hussey*, 13 N. Y. Weekly Dig. 514; *Chapman v. Forsyth*, 2 How. [U. S.] 202; *Neal v. Clark*, 95 U. S. 704.)

William F. Cogswell for respondents.

EARL, J. This action was brought by the plaintiffs to recover damages which they allege they sustained in consequence of the false and fraudulent representations of the defendants. The defendants in their answer, among other things, denied the alleged fraud and alleged that they had been discharged in bankruptcy. The material facts of the case are as follows:

In the years 1873-4-5 the plaintiffs, under the firm name of Lowery & Bradner, were dealers in wool and sheepskins at Rochester, and the defendants, under the firm name of Strang & Holland Bros., were commission merchants in the city of New York. During the years mentioned the plaintiffs had extensive business transactions with the defendants, sending them large quantities of wool to be sold upon commission, and during the same time it was the habit of the parties to exchange credits, and they had with each other large and numerous financial transactions. They drew drafts on each other, and the plaintiffs, from time to time, sent their notes to the defendants to be used by them in their business. On the 1st of March, 1875, there were a number of drafts outstanding, drawn by the plaintiffs upon and accepted by the defendants, and at the same time there were eight notes outstanding and running to maturity which had been made by the plaintiffs and sent to the defendants, and which had been negotiated by the defendants. On the 1st of March the defendants wrote the plaintiffs a letter requesting them to make and forward six notes dated respectively February 1, 9, 15, 20, 23 and 26, each at four

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months and for a little more than \$4,320, to meet six other notes of the plaintiffs described in the letter which would fall due in the month of March. They were requested to draw all the notes payable to their own order at the office of the defendants in the city of New York. In response to that letter they immediately made four notes, one for \$4,325.50 dated February 1, one for \$4,326.25 dated February 9, one for \$4,327.13 dated February 15, and another for \$4,327.15 dated February 20, all at four months, payable to their own order at the office of the defendants in the city of New York, and they indorsed the notes and sent them to the defendants. Before the 27th day of March the defendants had negotiated and used those notes. On the 27th of March the defendants wrote another letter to the plaintiffs, the letter being written by the defendant Strang and addressed to the plaintiff Lowery, in which it was stated "the notes we have received are all good, only we can't get money on them alone, and in the meantime we have paid about \$30,000 of your notes which these last were given to renew in part;" that "we have \$16,000 worth of notes not used;" that "you have notes coming due early in April and if you are going to pay them you had better arrange to do it." On the 2d day of April the defendants again wrote to the plaintiffs, the letter being signed and addressed in the same way as the prior one, stating that "your notes which have recently run off I might get renewed if you would send me say four notes having about three months to run, and payable at the Metropolitan National Bank, New York. I might use them. Have them for about \$4,000 each, but let the amounts be odd," and that "I dare not offer the notes we have of yours where the last run off were used, because the place where these are payable is at our office, and it would put them on inquiry at once."

In pursuance of the request contained in this letter the plaintiffs sent to the defendants four notes, one dated March 13, 1875, for \$4,850, one dated March 14, for \$4,951.25, one dated March 16, for \$4,860.30, and another dated March 20, for \$4,970, all at four months, payable to their own order at

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the Metropolitan National Bank, New York, and indorsed by them. The defendants received those notes and negotiated them, and received the proceeds thereof. On the 4th day of June thereafter, the defendants being insolvent failed, and petitions in bankruptcy were filed against them on the 3d day of July thereafter, and in June, 1877, they received their discharges in bankruptcy. At the time of their failure the defendants were indebted to the plaintiffs on all the accounts and transactions between them about the sum of \$1,000, aside from the proceeds received by them upon the four notes last above mentioned, which notes having passed into the hands of *bona fide* holders, the plaintiffs were subsequently obliged to pay. The plaintiffs claim that the defendants falsely represented in their letters of March 27, and April 2, that the four notes which they had sent in response to the letter of March 1, had not been used, and that in reliance upon such representations they made and sent to the defendants the four notes in response to the letter of April 2, and that they were damaged by the false representations to the amount of the sum which they were obliged to pay upon the four notes, which, together with interest at the time of the trial, amounted to \$17,518.86.

We think there was evidence sufficient to establish plaintiffs' cause of action. It is clear and undisputed from the evidence that on the 27th of March and on the 2d of April the defendants had negotiated and used all the notes which they had received from the plaintiffs.

It appears that sometime about the 1st of December, 1874, the plaintiffs sent to the defendants four notes of \$4,000 each, which fell due respectively March 5, 8, 10 and 13, 1875. Those notes were credited to the plaintiffs in the account kept by the defendants with them December 7, 1874. The defendants claim that they had not used those notes, and that those were the \$16,000 of notes not used, referred to in the letters of March 27 and April 2. We cannot assent to this claim. There is no proof to sustain it, and the just inference from all the evidence is against it. It cannot be inferred from any thing in the case that the defendants held notes from about

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the 1st of December until about the 1st of April without using them, and without notifying the plaintiffs that they had not used them. It does not appear where those notes were payable. They were mentioned in the letter of March 1, as notes soon to mature, which would have to be paid either by the plaintiffs or defendants, and the new notes requested in that letter were to cover those four notes, and two others to fall due later. The reference in the letter of March 27, to the “\$16,000 worth of notes not used” must have been to the four notes sent in response to the letter of March 1, which were the last notes preceding the 27th of March, and not to the four notes of \$4,000 each, which were then past due, and had probably been paid and taken up by the defendants. It is true that the four notes sent in response to the letter of March 1 amounted to more than \$16,000, but the amount was sufficiently accurate to convey to the minds of the plaintiffs a description of the notes intended. Again, it is clear that in the letter of April 2, Strang intended to convey the impression to the plaintiffs that the four notes not used were those last sent in response to the letter of March 1, because he assigns, as a reason for not using them, that they were payable at the office of the defendants, and those notes were so payable.

We are unable to perceive that it would aid the defendants if they could show that they had reference in the letters when speaking of notes not used to the four notes of \$4,000 each, because it is equally clear upon the evidence that those four notes had been used prior to the 27th day of March. They must have been negotiated, and in the hands of other parties, as they are charged in one of the accounts rendered by the defendants as paid by them. One is charged as paid on the 8th of March, the day it fell due, and the others are charged under date of March 30, and they were undoubtedly paid as they fell due.

It cannot be successfully claimed that the false representations contained in the two letters were not material, or that the plaintiffs did not have the right to rely upon them. It does not appear that the plaintiffs were bound or under any obligation to make and deliver the last four notes, and it does not

appear that they would have done so, but for the false representations. It appears that they were willing to send four notes to the defendants for upwards of \$4,000 each, and after they had sent such notes they were induced to send four more by the false representation that those sent had not been used. Such a representation, inducing action by parties to whom it was made, is unquestionably material.

It matters not what the state of the accounts between the parties was at the time the last notes were sent. It is clear that the plaintiffs were then not actually indebted to the amounts of those notes. The state of the accounts between the parties has real importance only as it bears on the *quantum* of damages. If the plaintiffs actually owed the defendants the amount of the notes and were never obliged to pay on them any more than they honestly owed the defendants, then they were not materially damaged by the fraud. But it turned out that when the defendants failed and when the plaintiffs were obliged to pay the notes they did not owe the defendants any thing and were damaged by their fraud to the full amount of the payments upon the notes.

It matters not that the plaintiffs were credited with the four notes sent in response to the letter of March 1, in an account rendered to them on March 31, 1875, before the last notes were sent, because they testified that they did not infer from the account that the notes had been used, but relied upon the statements contained in the letters that they had not been used.

On the 30th of June, 1875, the defendants rendered to the plaintiffs a statement of the accounts between them, in which the plaintiffs were credited with the proceeds of the notes last sent, and the plaintiffs retained that account down to the commencement of this action, all the time knowing of the fraud which they allege had been perpetrated upon them. The defendants, therefore, claim that the account so rendered became an account stated and that they thus accepted a credit for the proceeds of the notes and cannot, therefore, claim any thing on account of the alleged fraud. At the date when that account was rendered the notes had not fallen due, and if the defend-

ants had paid them no damage would have been caused to the plaintiffs by the fraud. The damage arose afterward when the plaintiffs were obliged to pay the notes. By retaining the account, therefore, which gave the plaintiffs no benefit whatever, the fraud was not condoned or waived, and it is impossible to see how they were barred in any way of their right to recover damages on account thereof. Merely crediting the notes in the account did not pay them and certainly did not satisfy any damages caused to the plaintiffs by the fraud.

The defendants Holland appear to have been entirely guiltless of any participation in the fraud perpetrated by Strang, but it is elementary law that they are chargeable and legally responsible for the fraud perpetrated by their partner in the transaction of the partnership business and the conduct of the partnership affairs.

The claim of the plaintiffs for damages on account of the fraud committed upon them by the defendants was not discharged by the bankruptcy proceedings. Debts only are provable in bankruptcy and, therefore, only can be discharged in bankruptcy. (U. S. R. S., §§ 5114, 5117, 5119.) This claim for damages could no more be discharged in bankruptcy than a claim for damages caused by libel, slander or assault and battery. (*Morse v. Hutchins*, 102 Mass. 439; *In re Devoe*, 2 N. Bank. R. 27.) The cases of *Hennequin v. Clews* (77 N. Y. 429; 33 Am. Rep. 641), and *Neal v. Clark* (95 U. S. 704) do not apply to a case like this. The defendants Holland, while they did not actually participate in perpetrating this fraud, are liable *civiliter* for the fraud to the same extent as if they had participated. Therefore the trial judge properly refused to nonsuit the plaintiffs.

During the progress of the trial the counsel for the defendants took numerous exceptions to rulings upon questions of evidence, and to the charge and refusals to charge, as requested, the most important of which, not substantially covered by what has already been said, will be briefly noticed. There was no error in allowing the plaintiffs to testify that in sending the last four notes they relied upon the statements contained in the

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letters of March 27 and April 2. Such evidence has frequently been held admissible. There was no error in refusing to permit the defendants Holland to testify they did not have any intention to deceive and defraud the plaintiffs in obtaining the four notes, because there was no claim that they personally did obtain them, or that they knew any thing about the contents of the two letters, or that they, or either of them, had any fraudulent intent. The only fraudulent intent relied upon by the plaintiffs was that of the defendant Strang, which was imputable to the other defendants. There was no error in refusing to allow either of the defendants to testify for what purpose the last four notes were obtained. A purpose is disclosed in the letters, and it would not aid the defendants to show that the notes were obtained for a different purpose, and so long as the fact remained that the notes were obtained by fraud, it is not perceived how the undisclosed purpose for which they were obtained could be material.

The plaintiff Bradner testified that he saw Strang a few months after the failure of the defendants and was told by him that when he got a discharge in bankruptcy, if he got one, he would have the ability and disposition to make an honorable settlement with the plaintiffs. This evidence was not objected to by the defendants. The counsel for the defendants requested the court to charge that the jury should disregard such evidence, as that conversation was not a new promise and was not legally binding upon Strang or either of the other defendants. No allusion was made to that evidence in the charge of the judge. It did not show a new promise and was wholly immaterial and irrelevant. It is impossible to perceive how the evidence could have harmed the defendants, and while the court could properly have granted the request, it is not perceived that the refusal to grant it was prejudicial to the defendants. If they regarded the evidence as prejudicial they should have objected to it at the time it was offered.

The exceptions contained in the case are very numerous, but we have carefully examined and considered them all, and without further giving any of them particular notice, it is sufficient

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to say that we are of opinion that no one of them is well founded.

The judgment should be affirmed, with costs.

All concur. except DANFORTH, J., taking no part and TRAOR, J., absent.

Judgment affirmed.

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GEORGE HARRIS, Respondent, v. JOHN S. PERRY et al., Appellants.

Under the provision of the act relating to buildings in the city of New York (§ 18, chap. 625, Laws of 1871, as amended by § 5, chap. 547, Laws of 1874), which provides that the opening of any elevator or hoistway in a building in said city shall be protected on each floor by railings and trap-doors, and that the trap-doors shall be kept closed at all times except when in actual use "by the occupant or occupants of the buildings having the use and control of the same;" where there are several occupants of a building, the duty is imposed upon the one whose use of the elevator or hoistway requires the opening, and whose disuse permits the close of the trap-doors; no one of them can be made liable for the neglect of another to perform such duty.

Defendants leased all of a building in said city above the first floor, which with the basement and sub-cellar was leased to other tenants; the tenants had a common right to use a shipping-room in the basement, and an elevator or hoistway for goods, which was part of the building running from the sub-cellar up to the upper story and moved by power furnished by the owners of the building, and under the control of an engineer employed by them. Plaintiff went to the shipping-room to procure goods purchased of defendants, and finding no one there to deliver, went to the elevator to call through the opening overhead as he had done before with safety. The room was dark; the elevator was not in use at the time, but was up near the first floor. The trap-doors in the basement floor were open, and plaintiff fell through to the sub-cellar and was injured. In an action to recover damages it did not appear that defendants had used the elevator last and only by a supposition of a clerk that they had used it that day. *Held*, that no negligence on the part of defendants or liability under said statute was shown; and that a refusal to nonsuit was error.

It seems that the question of contributory negligence on the part of the plaintiff was properly submitted to the jury.

Harris v. Perry (23 Hun, 244), reversed.

(Argued May 4, 1882; decided May 30, 1882.)

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APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, in favor of plaintiff, entered upon an order made December 16, 1880, which overruled defendants' exceptions and directed judgment on a verdict. (Reported below, 23 Hun, 244.)

This action was brought to recover damages for injuries alleged to have been occasioned by defendants' negligence.

The material facts are stated in the opinion.

Hamilton Harris for appellants. The plaintiff's negligence and want of care caused or contributed to his injury, and for this reason the motion for a nonsuit should have been granted. (Shearm. & Redf. on Neg., § 591; *Koch v. Edgewater*, 14 Hun, 544; *Totten v. Phipps*, 52 N. Y. 354; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Zoebish v. Tarbell*, 10 Allen, 385; *Victory v. Baker*, 67 N. Y. 366; *Pierce v. Whitcomb*, 48 Vt. 127, 131.) In the absence of proof that defendants left the guard down, a liability cannot be fixed by speculation upon them. (*Moore v. Goedel*, 34 N. Y. 527; *Kaiser v. Hirth*, 46 How. Pr. 161; *Donnelly v. Jenkins*, 58 id. 252.) Damages are to be proved and none can be allowed except such as are shown by the proof to be, at least to a reasonable degree, certain. (*Curtiss v. Rochester R. R. Co.*, 18 N. Y. 534-542.) This was not a case for exemplary damages. The plaintiff was entitled to recover, in addition to what a jury might award him for his suffering and physical injuries, only his pecuniary loss. (*Drinkwater v. Densmore*, 80 N. Y. 390-392; *Theobald v. The Railway P. A. Co.*, 26 Eng. L. & Eq. 432.)

Samuel Morris for respondent. It was the duty of defendants to see that the hoistway was not left in a condition dangerous to customers having occasion to visit the premises. This duty devolved upon them independent of the statute imposing it. (*Victory v. Baker et al.*, 67 N. Y. 370; *Chapman v. Rothwell*, 1 El. Bl. & El. 168; *Inderman v. Davis*, L. R., 1 Com. Pl. 274; *S. C.*, 2 id. 311; *Willey v. Mullaly*, 78 N. Y. 310; *Jetler v. N. Y. & H. R. R. Co.*, 2 Keyes, 158; *Brown*

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v. *The Buffalo & State Line R. Co.*, 22 N. Y. 19; *Massoth v. D. & H. C. Co.*, 64 id. 532; *Ryan v. Thompson*, 33 N. Y. Sup. Ct. 135; *Knupfle v. The Knickerbocker Ice Co.*, 84 N. Y. 490; *Devlin v. Gallagher*, 6 Daly, 496; *Haegi v. P. & N. Y. Steamboat Co.*, 54 How. Pr. 145.) Where a statute warns against a specific danger and enjoins the observance of a specific precaution against that danger, the neglect or failure to observe that precaution must be negligence *per se* if injury comes to another through such neglect. (*Johnson v. Bruner*, 61 Penn. St. 58.) The violation of the duty imposed upon the defendants by the express statutory provisions designed to protect human life, if it did not constitute negligence *per se*, certainly authorized the jury to find that such neglect of duty, under the circumstances, was negligence. (*Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 490.) The plaintiff was called upon to exercise only such care as an ordinary prudent man would exercise, placed in his circumstances. (*Sheridan v. B. & N. R. R. Co.*, 36 N. Y. 43; 32 Barb. 398; 34 N. Y. 670; *Fort v. Whipple*, 11 Hun, 590; *Weber v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 455; 1 Abb. Ct. of App. Dec. 131; *Davis v. N. Y. C. & H. R. R. R. Co.*, 47 N. Y. 402; *Byrne v. N. Y. C. & H. R. R. R. Co.*, 83 id. 620; *Ingersoll v. N. Y. C. & H. R. R. R. Co.*, 6 N. Y. Sup. Ct. 418; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 468; *Massoth v. D. & H. C. Co.*, 64 id. 524, 529; *Ireland v. O. H. & S. P. R. Co.*, 13 id. 533; *Renwick v. N. Y. C. R. R. Co.*, 36 id. 132; *Dolan v. D. & H. C. Co.*, 71 id. 285, 288, 289; *Hill v. N. Y. C. & H. R. R. R. Co.*, 64 id. 652; *Beisiegel v. N. Y. C. & H. R. R. R. Co.*, 34 id. 627; *Oldfield v. N. Y. C. & H. R. R. R. Co.*, 14 id. 314; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 244; *Cornwall v. Mills*, 44 N. Y. Sup. Ct. 50.) The defendants cannot escape responsibility because other parties had the right, in common with them, to use the elevator. (*Creed v. Hartman*, 29 N. Y. 591; 8 Bosw. 123; *Slater v. Mersereau*, 64 N. Y. 138; *Webster v. H. R. R. Co.*, 38 id. 260; *Chapman v. N. H. R. R. Co.*, 19 id. 341; *Barrett v. Third Ave. R. R. Co.*, 45 id.

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628; 8 Abb. [U. S.] 205; *Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 597.)

DANFORTH, J. Certain facts are undisputed. The plaintiff fell through a hoistway or elevator hole, from the basement into the sub-cellar of premises, No 84 Beekman street in the city of New York, and was injured. At the time of the accident the building was owned by the estate of one Andrews and was in the actual possession of two firms, Hayden, Gere & Co., and these defendants. Each firm occupied certain portions of the premises separately, but had a common right to use a shipping-room in the basement and an elevator or hoistway which was for goods only and ran from the sub-cellar up to the upper floor of the building. The defendants leased the four upper stories, beginning with the second floor, and including neither the first story, nor basement or sub-cellar. The elevator was part of the building, and was moved by power furnished by its owners under the management and control of an engineer employed by them. Hayden, Gere & Co. used and controlled the residue of the building. The elevator was not in use by either tenant at the time of the accident, but was raised above the basement and remained near the premises occupied by Hayden, Gere & Co. How it came there does not appear.

The plaintiff, to make out his cause of action, alleged that the defendants did, at the time stated in the complaint, "negligently and wrongfully leave the hole or hatchway uncovered and unprotected." Whether this was so, and whether the plaintiff's negligence contributed to the accident, were the questions in the case. Upon the last, that of contributory negligence on the plaintiff's part, we think it was properly submitted to the jury. He was bound to make out that he was free from it; but as we are now considering the question as one of law, the plaintiff is entitled to have the evidence construed in a manner most favorable to his position. All that the evidence in any way tends to prove must be deemed as fully proved; every fact which the testimony and reasonable

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inferences from it conduce to establish must be assumed to be established. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Payne, v. Troy and Boston R. R. Co.*, 83 id. 572.) The question could not be taken from the jury, nor their conclusion set aside unless the facts were free from every reasonable doubt. (*Totten v. Phipps*, 52 N. Y. 354; *Weber v. N. Y. C. & H. R. R. Co.*, 58 id. 451; *Thurber v. Harlem Bridge, etc., R. R. Co.*, 60 id. 326.)

The plaintiff was lawfully on the premises. He went to the shipping-room to procure some goods purchased of the defendants. It was not necessary that the place should be the usual one where such business as he had on hand was transacted; the room was open to, and used by customers, and furnished a means of approach to those parts of the building occupied by the defendants, or a means of communicating with them or their servants. While there he was guilty of no misconduct. Did his conduct indicate negligence as the only and necessary inference from it? He had purchased goods and went for them; finding no person to make delivery, he moved forward to call through the opening above his head. He had done so before in safety; this time he fell, the trap-door in the floor having been left open. Did he know there was an opening in the floor; or that there were trap-doors, and, if so, that they were open? The room was dark, and he testified that he had never noticed and did not know that the hoistway extended below that floor. Was his conduct negligent under these and other circumstances surrounding him? We think no error was committed by the trial judge in holding that the question was for the jury, but as it must, in view of the result we reach upon another proposition, again go before that body, it is inexpedient to discuss the testimony relating to it.

We are of the opinion, however, that the learned trial court erred in leaving the case to the jury, as one in which negligence on the part of the defendants could be found. The evidence referred to by the learned counsel for the respondent to overcome this proposition is as follows: *Hurd*, the engineer

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in charge of the machinery, and furnishing power to run it, was asked by plaintiff's counsel, "Do you furnish power to run that elevator?" A. "I do." Q. "Do you have any thing to do with the management of the elevator or car itself?" A. "No more than to see that it is kept in order." Q. "Meaning by that in running condition?" A. "If it breaks down I repair it." Q. "During May, 1878, who used that elevator?" A. "The firm of Perry & Co., and the firm of Hayden, Gere & Co." *Thompson*, a clerk of defendants, was asked, "Did the defendants use the elevator that day?" A. "I can't answer that, sir; I suppose we did, of course." Asked, "Do you know of their using it?" says, "No, sir." Asked, "Now, you had been shipping goods on this day, hadn't you?" A. "I had not; no, sir." Q. "Well, then, had there been goods shipped from the store?" A. "I suppose so." Q. "Don't you know whether there had been or not?" A. "No, sir." Q. "Well, you say you suppose of course that the elevator had been used by the company, or by some person connected with the company; it was used by them pretty much every day, wasn't it?" A. "By ourselves?" Q. "Yes?" A. "Yes, sir." Q. "Can you name any day during that month, except a Sunday or a holiday, that it was not used by you or somebody there?" A. "No, sir." Q. "Do you think there was one?" A. "I can't answer, sir." Q. "Do you think there was?" A. "I can't answer." Q. "Well, you think it was used on that day?" A. "I think it was, as I said."

Nothing more is claimed. It is clearly insufficient to charge the defendant with any act of commission, or with the omission of any duty. It does not appear even that they used the elevator on the day of the accident, or that at any time they left open the trap-doors or failed to guard the opening. The plaintiff, however, relies upon the statute relating to buildings in the city of New York. (Laws of 1874, chap. 547, § 5, p. 736.) By this it is enacted, among other things, that "in any store or building in the city of New York in which shall exist or be placed any hoistway, elevator or well-hole, the openings thereof through and upon each floor of said building shall

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be provided with and protected by a substantial railing, and such good and sufficient trap-doors, with which to close the same, as may be directed and approved by the superintendent of buildings; and such trap-doors shall be kept closed at all times except when in actual use by the occupant or occupants of the building having use and control of the same.” He contends that the defendants are chargeable with the care of the elevator, and bound to fulfill the statutory requirement, without regard to the actual use which preceded the injury, and simply because they had the right, as occupants of the building, to employ and use it. We cannot agree with this construction. It might apply if there was but one tenant or occupant, but where there are several, the duty is imposed upon the one occupant, or upon those occupants whose use required the opening and whose disuse of the elevator permitted the trap-door to be closed. Neither can be liable for the negligence of the other. Such is the reasonable construction of the statute, and the respondent refers to no case which makes any other necessary. Neither *Johnson v. Bruner* (61 Penn. St. 58) nor *Willy v. Mulledy* (78 N. Y. 310) affects the question. In each of those cases the defendant was the wrong-doer. Here the difficulty is, the defendants are not shown to be such. In *Moore v. Goedel* (34 N. Y. 527), the plaintiff and defendant occupied premises in common, and being injured by an overflow of water from a closet and wash-basin, the plaintiff sought to recover his damages from the defendant. It was held that he could not succeed without showing that the parties sued caused the overflow. Had the defendant been in the exclusive possession of the place from which the overflow came, the court said, “it would probably have been sufficient *prima facie* to have proved the injury and where the overflow occurred.”

That remark goes far enough, for it may at least be doubted whether the mere fact that an injury occurs on premises under the control and in the possession of a party, raises any presumption of wrong against him, but applying the principle of that case to the one before us, it would only make each occupant liable for his own negligence, and the statute goes no further.

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There can be no presumption of negligence against either occupant (*Moore v. Goedel, supra*; *Kaiser v. Hirth*, 46 How. Pr. 161; *Donnelly v. Jenkins*, 58 id. 252), and as I have before shown, there is no proof of any on the part of the defendants. Various other questions are presented by the appellant, but those discussed dispose of many of them, and others may not arise upon another trial.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

All concur, except MILLER and TRACY, JJ., absent.

Judgment reversed.

MATTHEW W. STEEN, Respondent, v. THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

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Defendant issued a policy of fire insurance, which limited the time for bringing an action upon it to a "term of twelve months next after the loss or damage shall occur." A loss was not payable under it until sixty days after the proofs required by it "shall have been received at the office of the company in New York, and the loss shall have been satisfactorily ascertained and proved." In an action upon the policy, *held*, that the period of limitation prescribed did not commence to run until a loss became due and payable, and the right to bring an action had accrued; and so, that an action brought within twelve months after the expiration of sixty days from the time of the loss was not barred by the limitation. *Johnson v. H. Ins. Co.* (91 Ill. 93; 33 Am. Rep. 47), *Fullam v. N. Y. U. Ins. Co.* (7 Gray, 61), disapproved.

The policy contained a condition that if the premises became vacant or unoccupied during the life of the policy, without the consent of the company indorsed thereon, it should become void. The insurance was upon a dwelling-house which was described in the policy as "occupied by a tenant for farm purposes." It became unoccupied, and that fact having been communicated to defendant's general agents, they, on the day the vacancy occurred, wrote in the policy after the words above quoted the following: "The dwelling-house being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to the policy." Vacancies also occurred after that during the life of the policy, and the house was vacant and unoccupied at the time of the fire, but whenever the house was unoccupied, it was in charge of a trusty per-

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son living near, who inspected and attended to it daily. *Held*, that the words so written in did not apply solely to the then existing vacancy, but worked a modification of the original contract; and that there was no forfeiture.

It was proved that one of the general agents, when informed that the house was again vacant, declared "that this clause upon the policy would hold good if it (the house) was unoccupied." *Held*, that the evidence was competent and that defendant was bound by the construction so given.

The policy contained a provision that "the use of general terms or any thing less than a distinct specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed condition or restriction therein." *Held*, that the general agents, unless specially restricted, could dispense with the condition orally as well as by writing.

Walsh v. H. F. Ins. Co. (73 N. Y. 5), *Van Allen v. F. J. S. Ins. Co.* (64 id. 469), and *Marvin v. U. L. Ins. Co.* (85 id. 278), distinguished.

The policy also contained a clause declaring that "in case of the creation of any lien, or the levy of an execution" upon "the subject insured," without the consent of the company indorsed thereon, the insurance should cease. The premises upon which was the building insured were sold on execution issued upon a judgment recovered against the insured after the issuing of the policy, they were purchased by plaintiff, and on that day defendant, by its said general agents, with notice of the judgment, execution and sale, gave consent in writing to an assignment of the policy to plaintiff, and it was so assigned. *Held*, that by the consent to the assignment, the policy became in effect a new contract between the parties unaffected by the forfeiture.

(Argued May 5, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 11, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was upon a policy of fire insurance issued October 25, 1873, by the defendant, through its general agents, E. Vail & Son, to one Jonas F. Atkins, then the owner in fee of the premises upon which the insured building was situated. The policy was for the sum of one thousand dollars, and was for the term of three years. The insured building was described in the policy as follows: "On his two-story frame dwelling-house, * * * and on stoops and piazzas attached,

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with shingle roof, occupied by a tenant for family dwelling.” The policy contained the following clauses.

“And the Niagara Fire Insurance Company hereby agree to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the 25th day of October, 1873, at 12 o’clock, noon, to the 25th day of October, 1876, at 12 o’clock, noon, to be paid in sixty days after the proofs required by this company shall have been received at the office of the company in New York, and the loss shall have been satisfactorily ascertained and proved, as required by the provisions of this policy.” * * *

“*Provided*, * * * if the premises are at the time of insuring, or during the life of this policy, vacant, unoccupied, or not in use, whether by the removal of the owner or occupant for any other cause, without this company’s consent is indorsed hereon, this insurance shall be void, and of no effect.” * * *

“*And provided further*, * * * in case of assignment before or after a loss, whether of the whole policy or of any interest in it, or of any sale, transfer or change of title in the property insured by this company, or of any undivided interest therein, or the entry of a foreclosure of a mortgage, or the creation of any lien, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease.” * * *

“The use of general terms or any thing less than a distinct specific agreement clearly expressed and indorsed on this policy shall not be construed as a waiver of any printed condition or restriction therein.”

“It is furthermore expressly provided, that no suit or action of any kind against this company for the recovery of any claim upon, under or by virtue of this policy shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months

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next after such loss or damage shall occur; and in case any such suit or action shall be commenced against this company, after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitations to the contrary notwithstanding."

About the 7th day of January, 1875, the dwelling-house in question — having been theretofore occupied by a tenant — became unoccupied, and that fact being communicated by Jonas F. Atkins to the Messrs. Vail, they wrote the following in the body of the policy, immediately after the description of the building: "The dwelling-house being unoccupied a short time, but being in charge of a trusty person living near by, shall be no prejudice to this policy, 7th of January, 1875, E. Vail & Son." In the latter part of January, it became again occupied; and during the non-occupancy the condition required by said indorsement or writing was fully complied with.

On the 20th day of April, 1875, a judgment was recovered against the said Jonas F. Atkins, on the next day a transcript of said judgment was filed, and said judgment was duly docketed in the Ulster county clerk's office. Execution was thereupon issued to the sheriff of Ulster county, who sold the premises thereunder on the 12th day of November, 1875, to the plaintiff. On the 13th day of February, 1877, plaintiff received the usual sheriff's deed. Four days after the sale by the sheriff, Atkins informed the Messrs. Vail of such sale. Atkins then executed an assignment of the policy to plaintiff, in the form and manner prescribed by the defendant, the consent of the company to such assignment having been given in writing, by its aforesaid general agents. About the 9th of December, 1875, the person theretofore residing in the insured building moved out. A few days thereafter Atkins informed the Messrs. Vail of the fact, and was assured by one of them that "this clause upon the policy would hold good if it was unoccupied." During the interval it was again in charge of a trusty and proper person, who lived about three hundred yards distant,

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and who visited, inspected and attended to it daily. On the 11th day of January, 1876, the insured dwelling-house was totally destroyed by fire, being worth at the time of its destruction a much greater sum than the amount of the policy. On the 18th day of February, 1876, due proofs of the loss were made, and on the 25th day of the same month, they were received by the company. This defendant refused to pay the loss, and this action on the policy in question was commenced by the service of a summons and complaint on defendant March 8, 1877.

Samuel Hand for appellant. This action cannot be maintained as it was not brought within twelve months next after the loss occurred, within the meaning of the parties, as expressed in the policy. (*Wilkinson v. Nat. F. Ins. Co.*, 72 N. Y. 501; *McClure v. Watertown Ins. Co.*, 90 Penn. St. 280.) The words "after the loss shall occur" refer to the time when the property was destroyed, and not when the claim accrued or became payable. (*Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Fullam v. N. Y. U. Ins. Co.*, 7 Gray, 61; *Prov. Ins. Co. v. Aetna Ins. Co.*, 16 Up. Can. Q. B. 135; *Schroeder v. Keystone Ins. Co.*, 2 Phil. [Penn.] 286; *Canaway v. M. Mut. Ins. Co.*, 26 La. Ann. 298; *Home Ins. Co. v. Nye*, 93 Ill. 271.) There being no consent to the vacancy existing when the fire took place it is fatal to recovery. (*Herman v. Adriatic Ins. Co.*, 85 N. Y. 162; *Van Allen v. The Farmers, etc., Ins. Co.*, 64 id. 469; *Walsh v. Hartford, etc.*, 73 id. 5; *Marvin v. Universal Co.*, 85 id. 278, 282.)

A. Schoonmaker for respondent. This action having been commenced within a year after proofs of loss were served on defendant, was begun within the time limited by the policy. (*Hay v. Star F. Ins. Co.*, 77 N. Y. 235; *Mayor v. Hamilton F. Ins. Co.*, 39 id. 46; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *People v. L. L. & G.*

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Ins. Co., 2 T. & C. 268; *Semmes v. Ins. Co.*, 13 Wall. 158; *Black v. Winneshiek Ins. Co.*, 31 Wis. 472; Wood on Fire Insurance, 145; *Barber v. F. & M. Ins. Co. of Wheeling*, 23 Alb. L. J. 239; *Stout v. City F. Ins. Co.*, 12 Iowa, 371; *Killip v. Putnam F. Ins. Co.*, 28 Wis. 472; *Longhurst v. Conway Fire Ins. Co.*, Bates' Dig. F. Ins. 390.) The insertion or indorsement made upon the face of the policy, January 27, 1875, by the agents, was a continuing waiver of the non-occupancy clause of the policy. (*Insurance Companies v. Wright*, 1 Wall. 456; Wood on Fire Insurance, 124, 141; May on Insurance, 181, 184; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Bargett v. Orient Ins. Co.*, 3 Bosw. 385; *Adams v. Greenwich Ins. Co.*, 9 Hun, 47; 70 N. Y. 166; *Palmer v. St. P. F. & M. Ins. Co.*, 18 Alb. L. J. 136.) The consent by defendant's agent to a transfer to plaintiff was a renewal of the policy, if it had become void by the sale or recovery of the judgments. (*Shearman v. Niagara Ins. Co.*, 46 N. Y. 526; *Hopper v. Hudson River F. Ins. Co.* 17 id. 424; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402; *Wolfe v. Security Ins. Co.*, 39 N. Y. 51; *Solme v. Rutgers Ins. Co.*, 5 Abb. [N. S.] 201; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523; *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; *Green v. Homestead F. Ins. Co.*, 82 id. 517.) Plaintiff had an insurable interest. (*Curtis v. Home Ins. Co.*, 1 Bissell, 485; *Ætna Ins. Co. v. Miers*, 5 Sneed, 139; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *McGivney v. Phœnix Ins. Co.*, 1 Wend. 85; *Pelton v. Westchester Ins. Co.*, 77 N. Y. 605; Wood on Fire Insurance, 581.)

DANFORTH, J. On the 25th of October, 1873, the defendant by its policy in writing undertook to insure James F. Atkins, for the period of three years thereafter, against loss or damage by fire, to the amount of \$1,000 on his dwelling-house, described as "occupied by a tenant for farm dwelling," but, immediately following these words, there was, on the 7th of January, 1875, written into the policy by the agents, who had by countersign-

ing given validity to it, these words: "The dwelling being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to this policy." Prior to the 16th of November, 1875, the premises were sold by the sheriff under an execution issued for the enforcement of a judgment theretofore, but after the date of the policy, recovered against the insured and then purchased by the plaintiff in this action. On that day with notice of the judgment, execution and sale, the defendant, by the agents above referred to, gave its consent in writing to an assignment of the policy to the purchaser, and it was assigned to him. On the 11th of January, 1876, the premises were injured or destroyed by fire to the full amount of the insurance. This action was commenced on the 3d of March, 1877, to recover the sum insured. The policy contains certain conditions hereinafter referred to, and the case made for the defense, and on which reliance is now placed, depends upon the alleged omission of the insured to comply therewith.

First. The contract limits the time for bringing an action under or by virtue of the policy, to a "term of twelve months next after the loss or damage shall occur," and declares that "in case any such suit or action shall be commenced, * * * after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitation to the contrary notwithstanding." The validity of such a stipulation is well settled (*Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499; 28 Am. Rep. 166; May on Insurance, § 478), and in this case the question is one of construction. What was the intention or understanding of the parties as to the time when the limitation should begin to run? The facts are undisputed, and the defendant's contention is that the words I have quoted are to be taken literally, and that they import a contract that no action shall be commenced after the expiration of twelve months from the happening of the fire by which the property insured was damaged or destroyed. On the other

hand the plaintiff has so far succeeded upon the ground that they relate to the time when a claim or cause of action accrues, on which a suit may be maintained; that no claim accrues or arises in favor of the insured upon the mere happening of the loss, nor until sixty days after the proof required by the insurers, or provided for in the policy, should have been received by them at their office in New York, and the loss satisfactorily ascertained and proved.

These events are made conditions and are certainly precedent to the maintenance of an action, and we are of the opinion that they cannot be disregarded in getting at the true understanding of the parties of the meaning of the clause in question. Indeed they seem to be the governing words of the contract. They are the words of the underwriters, intended for their protection, and qualify the general obligation to make good any loss not exceeding the sum insured or the interest of the assured in the property, by requiring preliminary proof, and a lapse even then of a fixed period before any cause of action can accrue. Except for these provisions, a suit would have lain upon the instant of the happening of the fire, or within a reasonable time thereafter.

Now if we look at the clause relied upon, we find the insurers prescribing a time after which no claim shall be brought, and a declaration that it shall not be sustainable unless commenced within "the term of twelve months," and a greater lapse of time is made "conclusive evidence against the validity of the claim then attempted to be enforced." It is plain that a "term," or period, is indicated after which the insurers shall not be liable, and the implied meaning of the same words must be, that within that period they are or will be liable to an action. The law in case of breach of contract limits the time of bringing an action to six years. The contract substitutes twelve months. If we take the appellant's construction, the term of twelve months is at once narrowed to ten months, for sixty days at least must elapse after "a loss by fire," before any suit could be brought, and the term is subjected to such additional abatement as may be made necessary by alleged in-

adequacy of proof or controversies between the insurers and the policy-holder before such loss is "satisfactorily ascertained." The delay incident upon such provisions is illustrated by a variety of cases heretofore considered by the courts, and among others, *Ames v. N. Y. Union Insurance Co.* (14 N. Y. 253); *Mayor v. Hamilton Fire Insurance Co.* (39 id. 45); *Hay v. Star F. Insurance Co.* (77 id. 235; 33 Am. Rep. 607); these cases in substance hold that the time of limitation prescribed by such a contract does not commence running until the right to bring an action exists. Whether the delay is caused by extraneous circumstances, made effective by the insurer, as in the above cases, or by the provision of the policy, giving time to the insurer, before the lapse of which, payment cannot be enforced, is immaterial. The delay in either case is caused by the insurer, and until by the terms of the policy a cause of action accrues, the period of limitation against its enforcement should not, in the absence of plain and unequivocal words requiring such a construction, be deemed to commence.

Here, we think, the intention of the defendant was to give the insured a full period of twelve months, within any part of which he might commence his action, and having by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provision of the policy. Having thus made the doing of certain things, and a fixed lapse of time, thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in condition to bring an action. Under any other construction, the two conditions are inconsistent with each other.

The cases cited by the learned counsel for the parties before

us show that the courts have differed as to the proper construction of the clause in question. In Illinois (*Johnson v. Humboldt Insurance Co.*, 91 Ill. 92; 33 Am. Rep. 47), in Massachusetts (*Fullam v. N. Y. Union Insurance Co.*, 7 Gray, 61), it is held to take effect from the time of the destruction of the property by the cause insured against. In Minnesota (*Chandler v. St. Paul F. and M. Insurance Co.*, 21 Minn. 85; 18 Am. Rep. 385, following, *The Mayor v. Hamilton Insurance Co.*, *supra*), it is applied to the time the cause of action accrues. In Wisconsin (*Killips v. Putnam F. Insurance Co.*, 28 Wis. 472; 9 Am. Rep. 506), the court inclines to the doctrine enunciated by us in the cases before referred to. (*Ames v. N. Y. Union Insurance Co.*; *Mayor v. Hamilton F. Insurance Co.*) We perceive no reason for departing from it, and adhere to the opinion that the limitation provided for by the clause in question should be construed as running from the time when the loss becomes due and payable, and not from the time when it in fact occurs. Construing these provisions of the policy together, this intention seems plain, but if there is ambiguity, the words must be construed most strongly against the appellant, who uses them, and in favor of the insured, as he might fairly have understood them (*Anderson v. Fitzgerald*, 4 House of Lords Cases, 484; *Hoffman v. Etna F. Insurance Co.*, 32 N. Y. 405; *Reynolds v. Commerce F. Insurance Co.*, 47 id. 597), and so as to sustain rather than defeat the contract of indemnity. No doubt the appellant could have stipulated that the time of the fire should be looked to as the event, from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder v. Keystone Insurance Co.* (2 Phil. 286), one of the cases cited by the appellant. Nor is the defendant's contention aided by the use of the words "loss occur" instead of "loss accrue." In *DeGrove v. Metropolitan Ins. Co.* (61 N. Y. 594; 19 Am. Rep. 305) the limitation clause was the same, and the court construed the word as synonymous with accrue, saying, "the plaintiff had twelve months from the time the cause

of action accrued," and in *Hay v. Star F. Insurance Co.*, the same word "occur" was used, but the court said, "the limitation should be construed to commence when the loss was due and payable, and not from the time of the physical burning of the property." There is undoubtedly a difference in the derivation and etymological meaning of the words, but as used by insurers and interpreted by the courts, they have in contracts of this kind the same signification. They represent the happening of an event from which a claim arises. Moreover, this construction accords with the general rule which regards the statute of limitations as beginning to run upon a contract of indemnity, from the time at which the plaintiff is actually damaged, and not from the happening of the event from which the loss arises.

Second. The policy provided that, "if the premises are, at the time of insuring or during the life of the policy, vacant, unoccupied, or not in use, whether by removal of the owner or occupant, or for any cause, without the company's consent is indorsed thereon, the insurance shall be void and of no effect." The court found that the house in question was occupied by a tenant up to about the 7th day of January, 1875, at which time it became unoccupied, and that fact being communicated by the party insured to the defendant's agents, the latter inserted the clause above referred to in the body of the policy, so as to make it a part of the contract, and also found that "the dwelling-house remained unoccupied until the latter part of January, 1875, when it was again occupied. During the non-occupancy, it was in charge of a trusty person living near by, who inspected and attended to it daily." It also appears that more than one vacancy occurred after this time, and the house was vacant and unoccupied at the time of the fire, but it continued in charge of a trusty man living near by, taking care of it and being there every day.

The learned counsel for the appellant contends that the permission written into the policy was applicable only to the then existing vacancy. This is not its necessary limitation. On the contrary it may be deemed to modify the original contract. It

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is a general rule that a writing contains all that may be fairly inferred from it, and taking the condition and the permit together, they import a qualification of the prohibition of the policy against vacancy to such an extent that, although the premises are temporarily and at different times vacant, the policy shall be unaffected, provided the terms of the permit are complied with. The oversight of a trusty neighbor is made to take the place of occupancy during occasional brief vacancies, and we might as well say that the condition was not violated unless the premises were vacant "during all the life of the policy," as to say that the permit applied to, and was exhausted by, a single occasion. The object was to get rid of the restriction, and if the words are ambiguous, the observations already made upon the method of interpretation apply here. The words are not limited to a single period, and embodied as they are in the contract, the insured is entitled to a construction favorable to himself so long as it is not unreasonable.

Moreover, the court find that the general agent, when informed by the insured that the house was again empty, declared "that this clause upon the policy," evidently referring to the permit, "would hold good if it (the house) was unoccupied." This evidence was admissible, and the construction given by him binds the defendant. It is true the agent testifies to the contrary, but the conflict of evidence was for the trial court, and the question was decided as one of fact and not of law. It is therefore sustained by *Underwood v. Farmers' Joint-Stock Ins. Co.* (57 N. Y. 500); *Pechner v. Phoenix Ins. Co.* (65 id. 195); *Marcus v. St. Louis Mutual Life Ins. Co.* (68 id. 625). It is found as a fact that the agent making the statement was a general agent, and it was clearly within the power intrusted to him as such. It is true there is a provision that "the use of general terms, or any thing less than a distinct specific agreement clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed condition or restriction therein," but the company itself could dispense with the condition by oral consent, as well as by writing, and the general agent, unless specially restricted, could do the same. This was held in

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Walsh v. Hartford Fire Ins. Co. (73 N. Y. 5). That case and others cited by the appellant, in *Van Allen v. Farmers' Joint-Stock Ins. Co.* (64 N. Y. 469), and *Marvin v. Universal L. Ins. Co.* (85 id. 278), were in favor of the defendant on the ground that by the terms of the policies in question, the power of the agent was limited, and the authority he assumed had been reserved by the company to its "officer" (*Van Allen v. F. J. Stock Ins. Co.*, *supra*); or was to be exercised only "at the head office," and authenticated by one of its officers. (*Marvin v. Universal*, *supra*.) Such reservation is not to be found in the policy before us, and the condition referred to cannot be deemed to affect one dealing with a general agent, who has original powers, co-extensive, as to the business in which he was engaged, with those of his principal.

Another defense rests upon an alleged violation of a provision of the policy declaring that "in case * * * of the creation of any lien, or the levy of an execution" upon "the subject insured, without the consent of this company indorsed hereon," the insurance secured thereby should cease. Liens by judgment and execution against the insured were obtained, but not by the consent or act of the insured. It is not necessary to consider whether or not they are within the prohibition. (*Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570); for after notice of the judgment, and its enforcement by execution, the company, by its general agents, consented to the assignment of the policy to the plaintiff, who was the purchaser at sheriff's sale. It thus became in effect a new contract between the company and the assignee, unaffected by the forfeiture, if in any event it could have been insisted upon. (*Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; *Hooper v. Hudson River Fire Ins. Co.*, 17 id. 424.)

We have examined the other minor objections stated in the printed points of the appellant, and are of opinion that the defendant has not shown sufficient ground to sustain this appeal.

The judgment should, therefore, be affirmed.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

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THEOPHILUS D. POWELL, as Receiver, Respondent, v. ALFRED WALDRON et al., Appellants.

By the by-laws of the "New York Cotton Exchange" a seat in the Exchange, the right to which is evidenced by a certificate of membership, is transferable by assignment of the certificate to members under certain prescribed rules and restrictions. *Held*, that such a right was property, and as such passed to a receiver appointed in supplementary proceedings on execution against the owner; and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor as collateral for a loan.

In an action by such a receiver to redeem and to compel the holder of a certificate so pledged to re-transfer on payment of the loan, *held*, that defendant could not defend on the ground of irregularities in the appointment of the receiver, it appearing that the judgment debtor consented to the appointment and so waived all irregularities.

On trial at Special Term of such an action, defendant demanded a trial by jury. This was denied, and a judgment directing a transfer of the certificate to plaintiff was rendered. *Held*, that a refusal of the demand was not error, as the action was an equitable one, and the effect of the ruling was to make it impossible to turn it into an action at law and compelled plaintiff to stand or fall in equity; also that the demand did not deny or challenge the equitable jurisdiction; and as no motion was made to dismiss the complaint or for judgment on the ground that no equitable cause of action had been shown, and as no exception was taken to the findings of law or fact, the defendant, by not objecting, submitted to the equitable jurisdiction and the question could not be considered here.

(Argued May 5, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 12, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as receiver, appointed in supplementary proceedings on execution against Louis L. Robbins, to redeem a seat in the New York Cotton Exchange, of which said Robbins was a member.

The complaint alleged in substance and it appeared that Robbins pledged his certificate of membership which entitled him to the seat, as collateral security for his note given for a loan,

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which note with the security was transferred to defendant, who upon tender of the amount unpaid upon the note, refused to accept or to transfer the certificate to plaintiff.

Said Exchange was a corporation duly organized with power to make by-laws, etc., and by its by-laws a certificate of membership could be transferred, after giving notice as prescribed, and under certain restrictions, but only to a member or a member elect by a surrender to the treasurer, with a duly executed assignment thereof, and the payment of specified fees for transferring, whereupon the treasurer was required to issue a new certificate to the purchaser. The judgment under which plaintiff was appointed receiver contained a provision that Robbins, the defendant therein, should assign and transfer to the plaintiff therein his seat or certificate of membership at its market value in payment of the money judgment rendered.

The action was noticed for trial at Special Term. When it was moved for trial defendants demanded a trial by jury which was denied, and defendants excepted.

Raphael J. Moses, Jr., for appellants. Defendant was entitled to a trial by jury. (*Durant v. Einstein*, 35 How. 241; *Earle v. N. Y. Life*, 7 Daly, 305; affirmed, 74 N. Y. 618; *Selden v. Vermilyea*, 3 id. 525; *Lewis v. Varnum*, 12 Abb. Pr. 308; 56 N. Y. 12; 36 id. 569, 573.) A receiver in supplementary proceedings differs from an assignee in bankruptcy, or one holding title by assignment from the debtor. (*Rutherford v. Hewey*, 59 How. Pr. 231; Equity, Steuben county; *Dubois v. Cassidy*, 75 N. Y. 302.) This, being a mere contingent interest of the debtor, would not pass to a receiver. (*Underwood v. Sutcliffe*, 77 N. Y. 62.) Until there has been a sale and a surplus ascertained it does not become property, but is a mere license or privilege to do business. (*Pancoast v. Gowan*, 7 Weekly Notes, 458; *Pancoast v. Houston*, 5 id. 36.) The failure of the plaintiff, Samuel E. Freeman, to comply with the terms of the decree of January 19, 1878, forfeited his rights in the seat, and that of his successors in trust. (*Penine*

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v. *Dunn*, 4 Johns. Ch. 140; *Dunham v. Jackson*, 6 Wend. 22; *Sherwood v. Hooper*, 1 Barb. Ch. 650.)

Archibald C. Shenstone for respondent. An action to redeem a pledge, where the pledge has been assigned, where the question of tacking is at issue, or where an accounting is asked for, is an equitable action. (2 Story's Eq., § 1032; Snell's Princ. of Eq. 231; *Adams v. Claxton*, 6 Vesey's Ch. 229; *Roberts v. Sykes*, 30 Barb. 173; *Stoker v. Cogswell*, 25 How. Pr. 305, 308; *Stokes v. Verrier*, 3 Swanst. 634; *Jones v. Smith*, 2 Vesey, Jr.'s Ch. 372; *Vanderzee v. Willis*, 3 Brown's Ch. 20; *Cortelyou v. Lansing*, 2 Caines' Cases, 200, 210; *Lewis v. Mott*, 36 N. Y. 395, 398; 2 Spencer's Eq. 772; 2 Story's Eq., § 1034; Kent's Com., Lect. 40, 585; Story's Bailments [9th ed.], 309, note; Story's Eq., §§ 717a, 718; 3 Black. Com. 432; 1 Powell on Mortgs. 335; *Demainbray v. Metcalf*, 2 Vernon, 691; *Brown v. Runals*, 14 Wis. 693; Smith's Manual of Eq. 318 [Ingersoll's ed.]; 2 Story's Eq., §§ 1032, 1263; *Perry v. Craig*, 3 Mo. 360; Fonblanque on Eq. 493; *Hart v. Ten Eyke*, 2 Johns. Ch. 62, 100; *Wayne v. Griswold*, 3 Sandf. 462, 478; 1 Bacon's Abridg. 611; *Kemp v. Westbrook*, 1 Vesey, Sr., 278.) The objection that plaintiff has a full remedy by law must be taken by answer. (*Cox v. James*, 45 N. Y. 557, 562; *Bell v. Spotts*, 40 Supr. Ct. 552; *Green v. Milbank*, 3 Abb. N. C. 138, 149; *Le Roy v. Platt*, 4 Paige, 77; *Cummings v. The Mayor*, 11 id. 596; *Grandin v. Le Roy*, 2 id. 509; *Clark v. Sawyer*, 2 N. Y. 498; *Truscott v. King*, 6 id. 147, 165; *Pam v. Vilmar*, 54 How. Pr. 235, 238.) The allegation that plaintiff's appointment as receiver was "duly" made is in strict accordance with the provisions of the Code, § 532. (*Rockwell v. Merwin*, 45 N. Y. 166; *Manley v. Rassiga*, 13 Hun, 288, 289.) The judgment-roll was properly admitted in evidence, defendant's attorney having failed to state the grounds of his objection and exception. (*Elwell v. Dodge*, 33 Barb. 336, 339; *Fountain v. Petree*, 38 N. Y. 185; 12 id. 451; 6 id. 30 and 347; 3 id. 247; 14 id. 328; 47 id. 576; 37 id. 435; 3 Hill, 609; 5

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Bosw. 312.) Where a judgment debtor appears in court in a legal proceeding against him, in which the court has jurisdiction, and consents that a receiver be appointed to take charge of his property, no other person can dispute the regularity of the proceedings and appointment. (*Lindley v. Sherman*, 1 Code R. [N. S.] 25; *Bowman v. Tallman*, 28 How. Pr. 482; 1 Tidd's Pr. 12; *Livingston v. Delancy*, 13 Johns. 537, 550; *Oakley v. Becker*, 2 Cow. 454; *Hommedieu v. Stowell*, 18 Abb. Pr. 336; 4 Wait's Pr. 630-631; *Tyler v. Willis*, 33 Barb. 327; *Morgan v. Potter*, 17 Hun, 403; *Underwood v. Sutcliff*, 10 id. 453; *Berry v. Riley*, 2 Barb. 307.) A seat in the New York Cotton Exchange is property that will pass to a receiver in proceedings supplementary to execution, subject to the lawful rules and by laws of the Exchange. (*Grocers' Bk. v. Murphy*, 11 Weekly Dig. 538; *In re Ketcham*, Bankrupt Daily Register, February 9, 1880; *Ritterband v. Baggett*, 42 Supr. Ct. 556; *Hyde v. Woods*, 4 Otto, 524; *Gallagher v. Lane*, 19 N. B. R. 224.)

FINCH, J. We think the right of the judgment debtor to a seat in the Cotton Exchange was property. That it had value was proved and is conceded; and that it could be transferred to a certain class of purchasers, under prescribed rules and conditions, is also established. The defendants took it as collateral to the note of Robbins and held it as security for that debt, and thereby plainly treated it as valuable property. Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, it was nevertheless a valuable right, capable of transfer and correctly decided to be property. (*Hyde v. Woods*, 4 Otto, 524; *Ritterband v. Baggett*, 42 Supr. Ct. [10 J. & S.] 556; *Grocers' Bank v. Murphy*, 11 Week. Dig. 538; *In re Kecham*, a Bankrupt, Daily Reg. Feb. 9, 1880.) It was something more than a mere personal license or privilege, for it could pass from one to another of a certain class of persons and belong as fully to the assignee as it did to the assignor. That characteristic gave it not only value which might attach

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to a bare personal privilege, but market value which usually belongs only to things which are the subjects of sale. However it differed from the incorporeal rights earlier recognized and described, it possessed the same essential characteristics. It could be transferred from hand to hand and all the time keep its inherent value, and be as freely and fully enjoyed by the permitted purchaser as by the original owner. We should make of it an anomaly, difficult to deal with and to understand, if we failed to treat it as property. The authorities which determine it to be such, seem to us better reasoned and more wisely considered than those which deny to it that character, although the subject of ownership, of use, and of sale.

Being property, it passed to the receiver in the supplementary proceedings, subject to the lien or right of the defendants. It bears no resemblance to the resulting trust referred to in *Underwood v. Sutcliffe* (77 N. Y. 62), for that vested wholly in the creditor for whose benefit it was raised, and no estate or interest, legal or equitable, remaining in the debtor, there was nothing for his receiver to take. Nor does it matter that the creditor, by his judgment previously obtained, had gained some hold upon and right to the seat considered as property. If he had a double remedy it was not for the defendants to dictate which he should pursue. There is but one claimant and no conflict of title. Nor are the defendants aided by the alleged defects in the appointment of the receiver. The judgment debtor consented and thereby waived all irregularities. (*Tyler v. Willis*, 33 Barb. 327; *Morgan v. Potter*, 17 Hun, 403.) The defects suggested were of that character, and cannot be considered between the present parties and in a collateral action. The right of the plaintiff, therefore, to redeem the seat of Robbins, upon payment to the defendants of the debt as security for which they held it, appears to us clear. Upon tender of that amount all right of the defendants to retain the seat and certificate disappeared, and they were bound to restore and assign it to the receiver. Whether he could make it available, or in what manner convert it into money, or how it might prove to be incumbered under the rules of the Exchange, are

after questions in which the defendants have no present interest.

They insist, however, that the plaintiff mistook his remedy, and should have resorted to a legal instead of an equitable action. He came into court upon a complaint setting forth what he claimed to be an equitable cause of action and asking the appropriate relief. As to him no mistake was made in treating it and trying it as such. (*Davison v. Associates of Jersey Co.*, 71 N. Y. 340.) The defendants were at liberty to question its character, but what they did was merely to demand a trial by jury. The request was ambiguous. It was not necessarily inconsistent with a concession that the action was of an equitable character, for in such actions a jury trial of one or more of the issues of fact may be granted or refused in the discretion of the court. (Code, §§ 971, 972.) But probably the request meant and was understood to mean something else. It was doubtless intended as a contention, that upon the facts stated there was a legal cause of action which should be tried before a jury. The ruling held the contrary and the defendants excepted. This ruling was right on the assumption that it was an equitable and not a legal action which was being tried. That was certainly the fact. No common-law judgment was rendered. That, as the case stood, could only have been for damages, but the relief awarded was that the defendants assign the certificate to the plaintiff. Practically the defendants' demand and the ruling of the court made it impossible for the plaintiff to turn his equitable action into one at law; left him deprived of an alternative; and compelled him to stand or fall in equity. Thus far there was nothing of which defendant could complain. The case was narrowed to an equitable cause of action or none, and the way was cleared by the ruling of the court to a consideration of that question. But it was not raised. A motion to dismiss the complaint, or for judgment on the facts as proved, on the ground that no equitable cause of action was shown, would have reached and tested all that remained of the case. The motion which was made went upon other grounds. It did not deny or challenge the equitable jurisdiction. No exception

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was taken to the finding of facts, and none to the legal conclusion that upon those facts the plaintiff was entitled to the equitable relief demanded by his complaint, and the question now sought to be argued is in no manner presented for our review. The defendants submitted to the equitable jurisdiction by not objecting to it. The trial court was not asked to say that there was no equitable cause of action by reason of an adequate remedy at law, or for any other reason which would bar the jurisdiction of equity, and we cannot consider such objection when urged, for the first time on appeal. (*Clarke v. Sawyer*, 2 N. Y. 498; *Truscott v. King*, 6 id. 147; *DeBussierre v. Holladay*, 55 How. Pr. 210.)

We think no error was committed in the disposition of the case and the judgment should be affirmed, with costs.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

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CHARLES W. HANDY, Appellant, v. JACOB K. DRAPER, Respondent.

A creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) cannot maintain an action against a stockholder to enforce the liability to creditors imposed by said act (§ 10), until he has obtained a judgment upon his claim against the corporation, and an execution has been issued thereon and returned unsatisfied.

The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of execution against the corporation.

It seems that under said act the conditions of enforcing such liability are:

First. The debt must be one payable within a year from the time it was contracted. *Second.* Suit against the corporation must have been brought within a year after the debt became due. *Third.* Execution against the company must have been returned unsatisfied. *Fourth.* Suits against persons who have ceased to be stockholders must be brought within two years thereafter.

Defendant's liability in such an action is limited to the amount of his stock with interest from the time of the commencement of the action.

Accordingly held that the allowance of interest from the date of the recovery of judgment against the corporation was error.

Handy v. Draper (23 Hun, 256), reversed.

(Argued April 28, 1882; decided May 30, 1882.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made December 14, 1880, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 23 Hun, 256.)

This action was brought against defendant as a stockholder of the Manhattan Sewing Machine Company, a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), to enforce the liability to creditors imposed by said act (§ 10), where the whole amount of capital stock has not been paid in.

The defense among other things was the statute of limitations. An action had been brought against the corporation, judgment recovered and execution returned unsatisfied. Defendant was a stockholder at the time of the commencement of this action. It was begun more than six years after the commencement of the action against the corporation, but within six years of the date of the return of execution on the judgment therein.

The Special Term allowed interest on the amount of defendant's stock from the date of the judgment against the corporation.

A. Loring Cushing for appellant. The amount of the stock held fixes the amount of the debt for which the stockholder is liable, and interest is to be added to this debt from the time the stockholder became liable to pay it, or became the debtor. (*Corning v. McCullough*, 1 N. Y. 54-55; *Moss v. Oakley*, 4 Hill, 265; *Burr v. Wilcox*, 22 N. Y. 55; *Shellington v. Howland*, 53 id. 371.) A stockholder cannot be sued under section 10 of the act of 1848 (Chap. 40), until after a judgment has been obtained against the corporation, and an execution issued thereon returned unsatisfied. (*Lindsley v. Simmonds*, 2 Abb. [N. S.] 76; Potter's Dwarries on Statutes, 187; *Lambert v. The People*, 76 N. Y. 220; *Jagger Co. v. Walker*, 43 N. Y. Sup. Ct. 275; *Agate v. Edgar*, Gen. Term Ct. of C. P.; *Handy v. Draper*, Opinion of Mr. Justice COOKE, Sup. Ct., Spec. Term, 2d Jud.

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Dept. ; *Merritt v. Reid*, Gen. Term Ct. of C. P., 1881 ; *Rocky Mount. Nat. Bank v. Bliss*, Opinion by Mr. Justice VAN VORST, Sup. Ct., Spec. Term, 1st Jud. Dept. ; Affirmed by Gen. Term of same Court, May, 1881 ; *Dean v. Mace*, 19 Hun, 391 ; *Shellington v. Howland*, 53 N. Y. 371 ; *Johnson v. H. R. R. Co.*, 49 id. 462 ; *Kincaid v. Dwinelle*, 59 id. 548 ; *Weeks v. Suydam*, 64 id. 175.)

James W. Treadwell for respondent. The only prerequisite to the right of action against a continuing stockholder is the commencement of suit against the company. (*Shellington v. Howland*, 67 Barb. 14.)

ANDREWS, Ch. J. We think that by the true construction of section 24 of the Manufacturing Corporations Act of 1848, it is a condition precedent to maintaining an action against a stockholder, to enforce the liability to creditors imposed by the tenth section, that the creditor should have obtained judgment upon his claim against the company, and that an execution should have been issued thereon and returned unsatisfied. The claim that the last clause of the section applies only to actions against persons who have ceased to be stockholders, makes the provision in the first part of the section which exempts an existing stockholder from liability, unless a suit "for the collection of the debt shall be *brought* against such company within one year after the debt shall become due," unnecessary and useless. No reason can be perceived for the requirement that a suit shall be first brought against the company as a condition of bringing an action against a stockholder, unless it was also intended that the remedy against the company, by the issuing and return of an execution, should be first exhausted. There is doubtless some obscurity in the section growing out of the arrangement of its several parts. The legislature intended to make a distinction in favor of those who had ceased to be stockholders in the company, by making a short statute of limitations applicable to persons so situated. It was therefore provided that suits against persons who had ceased to be stock-

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holders must be brought within two years thereafter. This provision was interjected into the body of the section, and following it is a specification of a condition in addition to those previously mentioned, "nor until an execution against the company shall have been returned unsatisfied in whole or in part," which we think was intended to apply in all cases. The section plainly treats the corporation as the primary debtor, and the liability of the stockholder as ultimate and subsidiary.

The tenth section makes stockholders, under special circumstances, liable "to creditors of the *company*" for "debts and contracts" of the *company*. The twenty-fourth section defines the conditions of enforcing such liability, *first*, that the debt must be one payable within a year from the time it was contracted; *second*, that suit against the company must have been brought within a year after the debt became due; *third*, that execution against the company must have been returned unsatisfied; and, *fourth*, that suits against persons who have ceased to be stockholders must be brought within two years thereafter. This is not the literal language of the section or the order in which the conditions are stated, but we think the arrangement suggested expresses the real intention of the legislature. Such a construction gives force and meaning to the entire section and is in harmony with the equitable rule that, before resorting to a surety, the creditor should exhaust his legal remedy against the principal when it will not impair the obligation of the creditor's contract or substantially impair his remedy. The construction here given to the section was expressly recognized by this court in *Kincaid v. Dwinelle* (59 N. Y. 548), and it has been adjudged by other courts in well-considered cases. (*Lindsley v. Simonds*, 2 Abb. [N. S.] 69; *Agate v. Edgar*, N. Y. Com. Pleas, not reported; *Rocky Mountain Bank v. Bliss*, Sup. Ct., 1st Dept., not reported; *Dean v. Mace*, 19 Hun, 391.) We think the Special Term should have allowed interest only from the time of the commencement of the suit. The General Term should have corrected the judgment in this particular, and this may now be done.

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The order of the General Term should be reversed and the judgment of the Special Term affirmed with the proper modification as to interest, without costs in the General Term or in this court.

All concur, except TRACY, J., absent.

Judgment accordingly.

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THE ROCKY MOUNTAIN NATIONAL BANK OF CENTRAL CITY,
Appellant, v. GEORGE BLISS, Respondent.

Under the provision of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), requiring as a condition precedent to the bringing of an action against a stockholder of a corporation organized under that act, to enforce his liability to a creditor of the corporation, imposed by the act (§ 10), that judgment shall be recovered against the corporation, and execution issued, and returned unsatisfied, a proceeding *in rem* affecting only property of the corporation attached, and execution against that property is not a compliance with the condition.

The recovery of a judgment and issuing of execution in another State is not a compliance with said condition; it requires a judgment in and execution issued out of a court of this State.

(Argued May 1, 1882; decided May 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 27, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial.

This action was brought by plaintiff, a creditor of the Ophir Gold Mining Company, a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), to enforce the liability imposed by said act (§ 10), when the whole amount of capital stock has not been paid in.

Plaintiff proved a judgment in its favor, rendered in the District Court of Colorado, in proceedings there commenced by attachment of the property of the company as a non-resident corporation; the issuing of execution, sale of the attached prop-

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erty for an amount insufficient to pay the judgment, and return of the execution unsatisfied as to the balance.

Joshua M. Van Cott for appellant. Plaintiff, having proved that a certificate had never been filed, that the capital stock had been paid in, established defendant's liability for the debts in question. (Laws of 1848, chap. 40, §§ 1011-24; *Aspinwall v. Sacchi*, 57 N. Y. 335; *Chase v. Lord*, 77 id. 7.) The court in Colorado acquired jurisdiction against the corporation, to render a personal judgment, by the due personal service of its process upon its general agent and superintendent there, who had contracted the debt in the course of its mining business there, of which he was in chief charge. (*Hill v. Spencer*, 61 N. Y. 274; *Lafayette Ins. Co. v. French*, 18 How. [U. S.] 404, 407-408; *Gibbs v. Queens Ins. Co.*, 63 N. Y. 114; *Hiller v. Burlington & M. R. Co.*, 70 id. 224; *Prouty v. M. S. R. Co.*, 4 T. & C. 230; *Barnet v. C. & L. R. R. Co.*, 4 Hun, 114; *Hayden v. Androscoggin Mill*, 1 Fed. Rep. 93, 6; *Wilson Packing Co. v. Hunter*, 7 Reporter, 455; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 368; *Moch v. Virginia Ins. Co.*, 10 Fed. Rep. 696.) Its judgment is entitled to full faith and credit in the courts of New York, under the Constitution and laws of the United States. (Wharton on Conf. of Laws, §§ 804, 810; Freeman on Judgments, § 221.) The requirement of the twenty-fourth section of the act of 1848 was satisfied, as to the remedy against a continuing stockholder, without the return of an execution on the Colorado judgment in whole or in part unsatisfied. (*Shellington v. Howland*, 67 Barb. 18; 53 N. Y. 371; *Handy v. Draper*, 23 Hun, 256.) The special award of execution against the attached property did not make the judgment less than a general personal judgment for the debt. (*Suydam v. Barber*, 18 N. Y. 47; *Darlington v. The Mayor*, 31 id. 192; *Patterson v. Perry*, 5 Bosw. 528; *Lynch v. Crary*, 52 N. Y. 184; *Maher v. Carman*, 38 id. 25; *Pope v. Cole*, 55 id. 124; *Produce Bk. v. Morton*, 67 id. 199; *Shellington v. Howland*, 53 id. 371;

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Kincaid v. Dwinelle, 59 id. 548.) The act of 1848 does not restrict the remedies of creditors against corporations and stockholders to the courts of this State. (Constitution, art. 8, §§ 1, 2, 3; *Chase v. Lord*, 77 N. Y. 24; 52 id. 207; 63 id. 425; *Robinson v. National Bk. of New Berne*, 81 id. 389; *Merrick v. Van Santvoord*, 34 id. 208, 212, 220; *Christian Union v. Soinet*, 9 Reporter, 607; *Wilson Packing Co. v. Hunter*, 7 id. 455; *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93, 6; *Moch v. Virginia F. Ins. Co.*, 10 id. 696; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 368; *Brownell v. T. & B. R. Co.*, 10 Reporter, 621; *Dennick v. R. R. Co.*, 103 U. S. 11; *Leonard v. Columbia St. Nav. Co.*, 11 Reporter, 505.) There is nothing in the act of 1848 which requires the stockholder to be sued in this State. Under the general law a debtor stockholder may be sued wherever he can be found. (*Lowry v. Inman*, 46 N. Y. 125; *Corning v. McCullough*, 1 Comst. 47; *Hawthorne v. Calef*, 2 Wall. 10; *Ex parte Van Riper*, 20 Wend. 16; *Griffith v. Mangam*, 73 N. Y. 611; *Merrick v. Van Santvoord*, 34 id. 218; *Cuykendale v. Miles*, 10 Fed. Rep. 342; *Flash v. Comm.*, 16 Fla. 428.)

Edmund Randolph Robinson for respondent. To render a stockholder liable for a debt of a corporation there must have been a failure to file a certificate as required, the bringing of a suit within a year from the time the debt became due, recovery of judgment and issue of execution thereon, and return thereof unsatisfied in whole or in part. (Potter on Corporations, 913, 925, 927; *Halsey v. McLean*, 12 Allen [Mass.], 438; *Lindsley v. Simonds*, 2 Abb. Pr. [N. S.] 69; *Kincaid v. Dwinelle*, 59 N. Y. 613; *Strong v. Wheaton*, 38 Barb. 618; *Dean v. Mace*, 19 Hun, 391; *Merritt v. Read*, and *Agate v. Edgar*, unreported decisions of the General Term of the Court of Common Pleas.) The provisions of the statute in question, imposing, as they do, personal liabilities upon the members of a business corporation, are penal in their character, should be construed strictly, and not extended by limitations. (*Bk. of Au-*

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gusta v. Earl, 13 Peters, 587; *Halsey v. McLean*, 12 Allen [Mass.], 438; *Gray v. Coffin*, 9 Cush. 192; *Dane v. Manufacturing Co.*, 14 Gray, 489; *Shaw v. Boylan*, 16 Ind. 384; *Cable v. McCune*, 26 Mo. 371; *Bank v. Hendrickson*, 6 Reporter 212; *Esmond v. Bullard*, 16 Hun, 65; *Losee v. Bullard*, 7 N. Y. Weekly Dig. 515; *Garrison v. Howe*, 17 N. Y. 464; *Birmingham Bk. v. Mosser*, 21 Supr. Ct. 605; *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 id. 133, 143; *Boynton v. Andrews*, 63 id. 93; *Jagger Co. v. Walker*, 43 Supr. Ct. 275.) A judgment, without the debtor's appearance, is of no force against other property, or for other purposes. In other words, it is not a personal judgment, but is only good and valid for the purpose of subjecting to sale any estate of the debtor seized by attachment within the jurisdiction. (*Woodruff v. Taylor*, 20 Vt. 65; *Megee v. Beirne*, 3 Wright [Penn.], 50; *Kilburn v. Woodworth*, 5 Johns. 37; *Pauling v. Wilson*, 13 id. 192; *Dobson v. Pearce*, 12 N. Y. 164; *Hand v. Shipman*, 6 Barb. 621; *Brewster v. The Michigan Central R. R. Co.*, 5 How. Pr. 187; *Starbuck v. Murray*, 5 Wend. 148.) The judgment in Colorado was one *in rem*, and imposed no personal liability. (*Hulbert v. Hope Ins. Co.*, 4 How. Pr. 275; *Brewster v. Mich. R. R. Co.*, 5 id. 183; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Howell v. C. & N. W. R. R. Co.*, 51 Barb. 378.) Even if the judgment could be treated as a general judgment, it is not a performance of the condition precedent required by the statute, as it was not recovered in any court of the State of New York. (*Dean v. Mace*, 19 Hun, 391; Daily Register, March 11, 1881; 2 R. S. 463, § 36 [Edm. ed. 483]; id. 173, § 38, p. 180; *Child v. Brace*, 4 Paige, 310; *Merchants' Bk. v. Griffith*, 10 id. 519; *Crippen v. Hudson*, 13 N. Y. 161; *Coe v. Whitbeck*, 11 Paige, 42; *Dix v. Briggs*, 9 id. 595; *Tarbell v. Griggs*, 3 id. 207; *Davis v. Bruns*, 23 Hun, 648; *Corey v. Cornelius*, 1 Barb. Ch. 571, 579; *Thomas v. Merchants' Bk.*, 9 Paige, 215.) The so-called execution was insufficient because it was by its express terms a special execution issued only against a part of the property of the Ophir Gold

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Mining Company, and was not even exhausted as to the part against which it was issued. (*Dix v. Briggs*, 9 Paige, 595; *Child v. Brace*, 4 id. 310; *Merchants' Bk. v. Griffith*, 10 id. 519; *Crippen v. Hudson*, 13 N. Y. 161.)

RAPALLO, J. The twenty-fourth section of the General Manufacturing Law of 1848 (Chap. 40) has been construed in the case of *Handy v. Draper** decided at the present term, and it is there held that the return of an execution unsatisfied against the corporation is a condition precedent to the right of a creditor to bring an action against a stockholder, and that this condition applies to the case of a continuing stockholder as well as to that of one who has ceased to be such.

The proceeding against the company in Colorado was not a compliance with this condition. It was a proceeding *in rem*, which affected only the property there attached, and the execution issued was only against that specific property. (*Dix v. Briggs*, 9 Paige, 595; *Crippen v. Hudson*, 13 N. Y. 161; *Thomas v. Merchants' Bank*, 9 Paige, 216.) But, in addition to that objection, we think that the statute requires the recovery of a judgment and the issue of an execution in this State. In requiring the creditor to exhaust his legal remedies against the corporation, before resorting to the personal liability of the stockholders, the statute could not have contemplated that the recovery of a judgment and issue of an execution against the company in any State of the Union should be a compliance with the condition. The legal remedies afforded by the courts of this State, where the corporation was created and is domiciled, are those which the legislature must be deemed to have intended. Such is the construction given to a similar provision in respect to creditors' bills, and although the cases are not precisely the same, we think that they strongly confirm the view that when a statute of this State requires, as a condition precedent to further proceedings in its courts, that an execution against the property shall first have been issued, it means that such execution shall have been issued out of a court of this

* *Ante*, p. 334.

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State of general jurisdiction. (*Tarbell v. Griggs*, 3 Paige, 207; *Dix v. Briggs*, *supra*; *Crippen v. Hudson*, *supra*.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

**ORRIN A. BILLS et al., Appellants, v. THE NATIONAL PARK
BANK OF NEW YORK, Respondent.**

Under the Code of Procedure (§§ 232-6), a debt evidenced by a negotiable security, owned by and in the hands of an attachment debtor, could be attached by serving the attachment upon the maker of the security.

While the attachment might be defeated by a subsequent transfer of the security to a *bona fide* holder for value, payment thereof by the maker to one, who to his knowledge did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, was no defense to an action to enforce the lien of the attachment.

Prior and up to April 27, 1875, the N. O., St. L. & C. R. R. Co. had a deposit account with defendant; the deposits being made by R., its assistant treasurer, and its principal officer in New York, of whose official position defendant was fully informed; on that day said company having a balance to its credit drew its check for the amount, which was certified by defendant charged to the company and delivered to R. On April 30, 1875, an attachment against said company was served upon defendant by delivery of a copy with proper notice. The check at that time was still in the possession of R., and was owned by the company. On the same day, shortly after the service of the attachment, and after R. had been informed thereof, he opened an account in his individual name, depositing to the credit thereof the said check and other negotiable securities drawn to his order as assistant treasurer, and belonging to said company. R. had no individual account prior to that date, and defendant had reason to and did believe that the securities were the property of the company, and that the deposit was intended to pay its debts; to which purpose it was afterward applied, being drawn out on the individual checks of R. In an action brought after the going into effect of, and pursuant to the provisions of the Code of Civil Procedure (§§ 677, 678), to recover the attached debt. *held*, that the plaintiffs were entitled to recover; that the certification of the check did not absolutely pay and discharge the deposit account, but the debt evidenced by it was liable to attachment; that the deposit of it by R. in his own name did not vest title in him, and as the debt remained the property of the company, it was properly attached, and the check having subsequently come to the hands of defendant, it was liable.

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As to whether the law in reference to attaching debts evidenced by negotiable securities has been changed by the Code of Civil Procedure (§§ 648, 649), *quære*.

Bills v. Nat. Park Bk. (15 J. & S. 302), reversed.

(Argued March 21, 1882 ; decided June 6, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 7, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial. (Reported below, 15 J. & S. 302.)

This action was brought to recover the amount of an alleged indebtedness of defendant on a deposit account of the New Orleans, St. Louis and Chicago Railroad Company, which plaintiff claimed had been attached under a warrant of attachment issued in an action brought by plaintiff Bills against said railroad company.

The material facts are stated in the opinion.

George H. Adams for appellants. The relation between the railroad company and the bank, so far as the deposit account was concerned, was that of debtor and creditor. (*Thompson v. Bank*, 13 J. & S. 17 ; *Espy v. Bank*, 18 Wall. 620 ; *Marine Nat. Bk. v. City Bk.*, 59 N. Y. 72 ; *Thompson v. Bank*, 82 id. 1 ; *Brownell v. Carnly*, 3 Duer, 9.) The railroad company could have sued the bank for its deposit. (*Thurber v. Blanck*, 50 N. Y. 86.) The certification created a relation like that arising from the acceptance of a bill of exchange. (*Espy v. Bk. of Cincinnati*, 18 Wall. 604 ; *Noel v. Murray*, 13 N. Y. 168 ; Byles on Bills, 381-82 ; *Blakely v. Jacobson*, 9 Bosw. 140 ; *Elwood v. Diffendorf*, 5 Barb. 400 ; *Porter v. Talcott*, 1 Cow. 359 ; *Sheey v. Mandeville*, 6 Cranch, 253 ; *Battle v. Coit*, 19 Barb. 68 ; *Thompson v. Bank*, 82 N. Y. 1, 8.) The act of the defendant in certifying this check was unlawful, and under the circumstances of this case, of no effect, and void. (*Merchants' Bk. v. State Bk.*, 10 Wall. 604 ; *Cooke v. Bank*, 52 N. Y. 96 ; *Broughton v. Salford Works*, 3 B. & A. 1 ; *Leavitt v. Palmer*, 3 N. Y. 19.) An attaching creditor can acquire through his attachment no higher or bet-

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ter rights to the property or assets attached than the defendant had when the attachment took place, unless there be fraud or collusion. (Drake on Attachments, §§ 223, 525, 601, 615; *Camp v. Clark*, 4 Vt. 387; 1 Dana, 580; 24 Vt. 363; 22 Iowa, 565; 6 N. H. 572; 3 Conn. 27; *Wood v. Bodwell*, 12 Pick. 268; *Briggs v. Block*, 18 Mo. 281; *Brown v. Foster*, 4 Cush. 214.) The defendant must show, in the face of the presumptions attaching to the transaction, an indorsement for delivery, and a delivery. (*Cushman v. Haynes*, 30 Pick. 132; *Mayor v. Chattahoochee Bk.*, 51 Ga. 325; *Freund v. Importers, etc., Bk.*, 12 Hun, 540; *Taacks v. Schmidt*, 18 Abb. 307.) The \$15,000 draft and the Wilmington draft of \$33,000 were subject to the attachment. (*McDaniel v. Hughes*, 3 East, 874; 1 Com. Dig., Attachment C., 541; Laws of 1842, chap. 197, § 2; Laws of 1848, chap. 53 [3 Edmunds' R. S. 681], § 2.) The levy was complete and sufficient. *O'Brien v. Mech. & T. Ins. Co.*, 56 N. Y. 55, 56; *Wehle v. Conner*, 69 id. 552.)

Francis C. Barlow for respondent. An attachment only binds money or property in the hands of a third person at the time of its levy. (Old Code, §§ 227-231, 235; *O'Brien v. Ins. Co.*, 56 N. Y. 52.) Unless the statute expressly so provides, no effects of the defendant coming into the garnishee's hands, or indebtedness accruing from the garnishee to the defendant, after the garnishment are bound thereby. (Drake on Attachments [5th ed.], §§ 451 a, 451 d.) The certificate provided for by section 236 of the old Code is not in the nature of a plea, nor is any judgment entered against the garnishee. (Old Code, § 236; *O'Brien v. Ins. Co.*, 56 N. Y. 60.) Attachments touch only legal titles, and the bank had no right to hold equitable interests under this process. (*Thurber v. Blanck*, 50 N. Y. 80; *Castle v. Lewis*, 78 id. 137; *Greenleaf v. Mumford*, 35 How. 148.) A bank cannot inquire into, or dispute the title of a depositor. (*Sims v. Bond*, 5 Barn. & Ad. 389; *Lassell v. Cooper*, 5 C. B. 525, 531, 532.) Innocence and right are always to be presumed, especially as to negoti-

able paper. (*City of Lexington v. Butler*, 14 Wall. 296; *Bissell v. R. R. Co.*, 22 N. Y. 290; *Barnes v. Ontario Bk.*, 19 id. 164.) The possibility that Rodney might have held the equitable title, as he certainly did the legal, is enough to protect the bank. (*Magee v. Badger*, 34 N. Y. 247, 249.) It is to be presumed that the bank charged the amount of the certified check against the drawer's account. (*First Nat. Bk. v. Leach*, 52 N. Y. 352; Drake, *ubi supra*, § 585, p. 498.) A check drawn to the drawer's own order may be negotiated to a third person, and the presumption is that it was procured to be certified for that purpose. (Drake on Attachments [5th ed.], § 585, p. 498.) The plaintiff in a suit can only recover on his right and title as they existed at the beginning of the action. (*Muller v. Earle*, 37 Supr. Ct. 388.) Where the interest of the attachment defendant is contingent, it is not liable to attachment. (*Bates v. R. R. Co.*, 4 Abb. 72, 73, 82.) The rulings rejecting the check book were correct. (*Huff v. Bennett*, 6 N. Y. 337, 339; *Russell v. R. R. Co.*, 17 id. 134, 140; *Juniata Bk. v. Brown*, 5 Serg. & R. 231; *Smith v. Lowe*, 12 id. 87; *Sackett v. Spencer*, 29 Barb. 180; *Halsey v. Sinsebaugh*, 15 N. Y. 485, 487, 488; *Russell v. R. R. Co.*, 17 id. 134, 140.) Because incompetent testimony is admitted, it is not to govern during the progress of the trial. (*Hamilton v. R. R. Co.*, 51 N. Y. 100, 106, 107; *Dean v. Aetna Ins. Co.*, 2 Hun, 368.) The burden of proof being on the plaintiff, he must show clearly that every deposit actually reached the bank, and that he made them. (*White v. Nellis*, 31 N. Y. 405; *Ellis v. Railway Co.*, L. R., 9 C. P. 557; *Priest v. Nichols*, 116 Mass. 401.) If all the evidence as to some of the deposits being made by other persons was left out, Rodney's testimony would not come within the rule as to memoranda. (Stephens' Digest of the Law of Evidence [2d ed., London, 1876], 84; *Braine v. Preece*, 11 M. & W. 773; *Lewis v. Kramer*, 8 Md. 265, 287; *Harwood v. Mulry*, 8 Gray, 250; *Price v. Torrington*, 1 Salk. 285.)

EARL, J. The following among other facts were found by the referee: For more than six months prior to April 30,

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1875, the New Orleans, St. Louis and Chicago Railroad Company had had a deposit account with the defendant, the National Park Bank. During all that time John M. C. Rodney was the assistant treasurer of the railroad company, in the city of New York. As such he was the principal officer of the company in that city, and either personally or through his assistants made all the company's deposits in the bank which were made therein, and together with the president of the company he signed all the checks or drafts that were drawn by it against such deposits. The bank during all the time was fully informed of the official position of Rodney, and prior to April 30, 1875, it had never had any dealings with him as a depositor otherwise than in his official and representative character. On the 27th day of April, the bank was indebted to the railroad company on its deposit account in the sum of \$6,485.33. On that day the company drew its check upon the bank payable to the order of Rodney, as assistant treasurer, for \$6,600, which check the bank then and there certified in writing to be good and then charged the same to the company and delivered it, thus certified, to Rodney. On the 30th day of April, Bills, one of the plaintiffs, commenced an action in the Superior Court of the city of New York, against the railroad company, to recover the sum of upwards of \$21,000. On the same day a warrant of attachment was issued in that action, directed to Connor, the other of the plaintiffs, who was then sheriff of the city and county of New York, directing him to attach and safely keep all the property of the railroad company within the city and county of New York; and on that day about half after two o'clock, p. m., he duly served the attachment upon the defendant by delivering a copy thereof, together with a proper notice, to its president, in which notice it was stated that he had attached all the property, debts, credits and effects then in the possession, or under the control of the bank, and that he required it to deliver all notes, books, vouchers, papers, debts, credits, effects, etc., into his custody without delay. The railroad company continued to own the certified check and Rodney continued to be possessed of it

as such assistant treasurer until after the attachment was served on the defendant as stated. On the same day about the close of banking hours, and shortly after the attachment had been served on the bank, and after Rodney had been informed by the bank that the attachment had been served, he individually and in his own behalf opened an account with the bank and then and there deposited to his individual credit therein, and as being his property, the certified check and other negotiable securities drawn to his order as such assistant treasurer and being the property of the railroad company, amounting in the aggregate to upwards of \$55,000. Among the securities so deposited by Rodney was one draft or check for \$33,000, and another draft or check for \$15,000, which had been forwarded to him by the railroad company for the special purpose of paying coupons owing by it falling due the next day, and the proceeds of the checks were applied by Rodney to that purpose. At the time the deposit was made by Rodney to his individual credit, the bank had good reason to believe, and did believe, that the securities so deposited by him were the property of the railroad company, and that he intended to apply the credit which he obtained by the making of the deposit to pay lawful and just debts owing by the company, and he did so apply the same, and soon after making the deposit drew the amount thereof from the bank upon his individual checks upon the bank which were paid by it. Subsequently judgment was recovered against the railroad company in the action commenced by Bills against it, and thereafter upon his application the court granted leave to bring this action against the defendant pursuant to the provisions of sections 677 and 678 of the Code of Civil Procedure.

The question now to be determined is, whether upon the facts so found by the referee, the debt due from the defendant to the railroad company was so attached as to enable the plaintiffs to maintain this action to recover the same. The Code of Procedure which was in force at the time the attachment was issued, and served, in sections 231, 232, 234, 235 and 236, authorized the seizure of all the property of the attachment debtor within the county of the sheriff, as well debts and

credits due him as tangible personal property, and the execution of the attachment upon debts and credits was required to be made by leaving a certified copy of the warrant of attachment with the debtor, with a notice showing the property levied upon. Here there is no question that the attachment was properly served, if there was any debt due from the defendant to the railroad company upon which the sheriff could levy. The bank was indebted to the railroad company when it certified the check. That certification did not absolutely pay and discharge the deposit account. It did so only *sub modo*, in the same way that a debt is paid by the promissory note of the debtor. Notwithstanding the certified check, the railroad company could have returned it and sued upon the deposit account, or without first returning it, could have sued upon the account, surrendering the certified check upon the trial, first, however, demanding payment. But regarding, as we should, the certified check as a negotiable security issued by the bank to the railroad company and payable to any *bona fide* holder thereof who should present the same, yet the debt evidenced by such security was liable to be attached in a suit against the railroad company as its property, and could be attached by service of the attachment upon the bank in the manner in which this attachment was served. It is generally the law in this country under statutes like those which existed in this State, that a debt evidenced by a negotiable security can be attached, and the following rules may be deduced from adjudged cases:

While the negotiable security is held by the attachment debtor it may be attached by the service of an attachment upon the maker, provided the negotiable security is past due.

If the security be not past due at the time the attachment is served, but thereafter remains in the hands of the attachment debtor until it becomes due, then the attachment is effectual.

Where a debt evidenced by a negotiable security is thus attached, the attachment is effectual against everybody except a *bona fide* taker of the security after the attachment. The care and purpose of the courts in such cases is to protect the maker

of the security against double payment, and when that can be accomplished the attachment can be made effective. If the security is not due then there must be proof, that it was in the hands of the attachment debtor when the attachment was served, and in the absence of proof, that will not be presumed; in other words, it must be shown that it was in such a condition as to be liable to the attachment. (See *Drake on Attachments*, §§ 573-592, where very many authorities are cited and commented on.) In *Enos v. Tuttle* (3 Conn. 27), HOSMER, Ch. J., said: "There exists no doubt that a negotiable note before it has been negotiated may be attached on a demand against the payee, liable to be defeated by the transfer of the note at any time before it falls due." In Iowa and California it has been decided that the maker of a negotiable instrument can be charged as garnishee of the payee after the instrument has become due, provided it is shown to be at the time of the garnishment in the defendant's possession. (*Commissioners, etc., v. Fox, Morris*, 48; *Wilson v. Albright*, 2 G. Greene, 125; *Gregory v. Higgins*, 10 Cal. 339.) And such is believed to be the rule in most of the States where it is not modified by statute.

Here it is found by the referee that the certified check, at the time the attachment was served, belonged to the attachment debtor, and, in fact, there never was a time prior to the payment of the check by the bank when it did not belong to it. The fact that Rodney took it to the bank, and took credit for it in his own name, did not vest the title of the credit in him. He took credit in his name, upon the undisputed evidence, for the benefit of the company, intending to use the money thus standing to his credit for the benefit of the company, and he in fact did so use it; and it is found by the referee that the bank had good reason to believe, and did believe, when it paid the check subsequently to the attachment, that it belonged to the railroad company, and that Rodney intended to apply the credit which he obtained for the benefit of the company. Thus the debt due from the bank to the railroad company was attached while it was due to the company, and despite the attachment was afterward paid by the bank, in fact, to the rail-

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road company. Upon the facts found it cannot be well claimed that the payment was made in good faith. It would be a reproach to the administration of justice if such mere legerdemain, such dexterous manipulation could defeat an attachment regularly served.

It has generally been understood to be the law in this State that a debt evidenced by a negotiable security, whether due or not, so long as it is in the hands of the attachment debtor, can be attached by serving the attachment upon the maker of the security. The attachment may be defeated by a subsequent transfer of the security to a *bona fide* taker, for value, who is in a position to enforce it against the maker. But before the debt can be enforced against the maker under the attachment, the sheriff must obtain possession of the security so that upon the trial he can surrender it to the maker, or he must show that it has already got into the hands of the maker, or that for some other reason it could not be enforced against the maker by any other person. Here there is no difficulty, as the certified check is in the hands of the defendant. If the defendant had not taken it and paid it by giving credit to the treasurer Rodney, it may be that the sheriff, by proper proceedings taken, could have obtained possession of it. The defendant cannot defend itself now by showing payment of the check to one who to its knowledge did not hold it for value, or in good faith, and who, in fact, held it for the railroad company and for no other purpose. If the bank had not been a willing party to defeat this attachment it could have suffered no embarrassment. If it entertained a suspicion or belief that Rodney had no title or claim to the check or the debt evidenced thereby, it could have refused payment to him and, in case of an action commenced therefor by either party, could have interpleaded the other party. There can be no greater embarrassment to the makers of negotiable securities, in allowing them to be thus attached, than exists in all cases where such securities are lost or stolen, or where there are conflicting claimants to them or disputes about the ownership of them. The makers have their protection, in case they cannot definitely ascertain to whom payment

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can safely be made, by interpleading antagonistic claimants. If negotiable securities can be attached only by service of the attachment upon the attachment debtor, and the actual seizure of the securities while he holds or owns them, then a fraudulent debtor may easily place his creditors at defiance by concealing himself or absenting himself from the State, and although his debtors remain within the jurisdiction of the court, the debts cannot be attached ; or he may, after the attachment has been served upon his debtor, make a fraudulent, sham or merely formal transfer of the securities and thus defeat the attachment. Such has not, we believe, been generally understood to be the law in this State, and is not now the law, except as it is made so by sections 648 and 649 of the Code of Civil Procedure, the effect of which is not now in question and need not now be determined.

I am, therefore, of the opinion that the plaintiffs, upon the facts appearing, were in a position to maintain this action, and that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent.

Judgment reversed.

WILLMINA B. NEILLEY, as Administratrix, etc., Respondent, v.
JOHN H. NEILLEY, et al. as Administrators, etc., Appellants.

The provision of the Revised Statutes, prohibiting an executor or administrator from retaining any part of the property of the decedent, "in satisfaction of his own debt or claim until it shall have been proved to or allowed by the surrogate" (2 R. S. 88, § 88), gives to the surrogate jurisdiction to pass upon and settle claims held by the executor or administrator in a representative capacity against the estate, as well as one held by him individually.

Accordingly *held* that a surrogate, on settlement of the accounts of an administrator, had jurisdiction to pass upon and settle a claim against the estate held by him as the administrator of another estate, and that a decree of the surrogate disallowing said claim, was a bar to an action to recover the same.

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Also that the fact that another was joined as administrator of one estate while he was sole administrator of the other was immaterial.

Neilley v. Neilley (23 Hun, 651), reversed.

(Submitted May 4, 1882 ; decided June 6, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 8, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 23 Hun, 651.)

This action was brought by plaintiff, as administratrix of the estate of Sarah Byron, deceased, to compel defendants, as administrators of the estate of Alexander Waldron, deceased, to account for and pay over an alleged trust fund in the hands of their intestate at the time of his decease.

The defendants' answer set up the statute of limitations, and the surrogate's decree on settlement of their accounts.

The referee found in substance that on or about the 4th day of November, 1882, the said Sarah Byron placed in the hands of her brother, Alexander Waldron, in trust, the balance of a legacy bequeathed to her by her father, and received from him the following paper :

"I do hereby acknowledge to have in my possession, and hold in trust for my sister Sally, the wife of George Byron, the sum of \$268, being the balance due to her this day for her proportion of \$1,000 directed to be paid by my father in his last will and testament by my brothers Jacob, Tobias and myself, to his daughters, for which sum I promise to pay my sister legal interest as long as the same remains in my hands, and from time to time, as her necessities may require, advance to her a proportion of the principal moneys, it having been agreed between me and her husband, the said George Byron, that the said moneys shall remain in my hands in trust for his wife and for her sole benefit.

"Witness my hand this 4th day of November, 1828.

"\$268. (Signed) ALEXANDER WALDRON."

Sarah Byron died in 1842, leaving her surviving her daughter, and only heir at law, the plaintiff Willmina B. Neilley,

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wife of John H. Neilley, and letters of administration were duly issued to her said daughter by the surrogate of Rockland county. Alexander Waldron died in 1877, and letters of administration on his estate were duly issued to said Willmina B. Neilley and John H. Neilley, her husband, by the said surrogate. No part of the principal or interest of said trust fund has ever been paid over or accounted for by the said Alexander Waldron or his said administratrix or administrator. Prior to the commencement of this action, and on or about the 16th day of September, 1878, the defendants, as such administrator and administratrix, commenced a proceeding before the surrogate of Rockland county for the final settlement of their accounts. Plaintiff, as administratrix of Sarah Byron, deceased, had previously presented to the defendants, as administrators of Alexander Waldron, a claim for the payment of the principal and interest of said trust fund to her out of the estate of said Waldron, which claim the said administrators of Alexander Waldron did not allow. Upon the said final accounting plaintiff, as administratrix, as aforesaid, presented said claim to the said surrogate and asked that he would allow it out of the Waldron estate. Certain of the heirs of Alexander Waldron, deceased, appeared on said accounting and filed objections to the allowance of said claim, among other things claiming that such a claim ought not to be determined upon a final accounting in a Surrogate's Court, and that the claim was barred by the statute of limitations. A hearing was had thereon and testimony was taken before said surrogate, who made an order or interlocutory decree, whereby he ordered and decreed that said demand was not a valid claim against the estate of said Alexander Waldron, deceased, and setting aside and disallowing the same. Plaintiff, as administratrix of Sarah Byron, appealed to the Supreme Court from said order or decree, which appeal is still pending and undetermined.

As conclusions of law the referee found that the paper so signed by Alexander Waldron was a declaration of trust on his part; that the surrogate of Rockland county had no jurisdiction to dispose of the claim submitted to him on the final ac-

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counting to, and the order or decree so made by him was not a bar to this action, and that the claim made by the plaintiff was not barred by the statute of limitations.

C. Stewart Davison for appellants. The adjudication of the surrogate of Rockland county, upon the question never having been reversed or set aside, is a defense to this action. (*Rigney v. Coles*, 6 Bosw. 479; *People v. Townsend*, 37 Barb. 320.) That the surrogate had jurisdiction is not only within the words of the statute (2 R. S. 88, § 33), but within the adjudications of the court. (*Kyle v. Kyle*, 67 N. Y. 400; *Shakspeare v. Markam*, 72 id. 400; *Boughton v. Flint*, 74 id. 476; *Smith v. Webb*, 1 Barb. 230.)

George H. Forster for respondent. The proceedings before the surrogate were without jurisdiction, null and void. (*Bevan v. Cooper*, 72 N. Y. 318, 327; *Curtis v. Stilwell*, 32 Barb. 354; *Stilwell v. Carpenter*, 59 N. Y. 414.)

ANDREWS, Ch. J. We are of the opinion that the surrogate of Rockland county, had jurisdiction on the final settlement of the accounts of the defendants, as administrators of the estate of Alexander Waldron, to pass upon and settle the claim of the plaintiff as administratrix of the estate of Sarah Byron, against the estate of Alexander Waldron, arising out of the instrument of November 4, 1828. The plaintiff was administratrix of both estates. By 2 Revised Statutes, page 88, section 33, it is provided that "no part of the property of the deceased shall be retained by an executor or administrator, in satisfaction of his own debt or claim, until it shall have been proved to, and allowed by, the surrogate; and such debt or claim shall not be entitled to any preference over others of the same class." At common law an executor or administrator had the right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree. This privilege extended not only to debts which he claimed beneficially, but to those to which he was entitled as trustee. (*Rogers v. Hoosack's Ex'rs*, 18 Wend. 319; *Plumer v. Marchant*, 3 Burr. 1380; *Williams on Ex'rs*, 1039.) This rule

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is said to have resulted by operation of law, on the ground that it is absurd and incongruous that an executor or administrator should sue himself, or that the same hand should at once pay and receive the same debt. (Williams on Ex'rs, 1040; *Kyle v. Kyle*, 67 N. Y. 400.)

The Revised Statutes by the section quoted, abrogate this common-law rule, and the section as construed, confers upon the surrogate jurisdiction to adjudge and allow, or disallow a claim of an executor or administrator, whether legal or equitable, against the estate he represents. (*Kyle v. Kyle*, *supra*; *Shakespeare v. Markham*, 72 N. Y. 400; *Boughton v. Flint*, 74 id. 476.) It is insisted that the section applies only to debts or claims of an executor or administrator in his own right. We think this construction is too narrow. It would leave the common law in force as to claims held by an executor or administrator as such against another estate of which he was also the representative, and this could not have been intended. The words "his own debt or claim" include a claim as executor or administrator. An executor or administrator is the legal owner of the personal estate, and chases in action of the decedent, and in this case the plaintiff is also the sole beneficial owner of the demand in controversy. The reason of the rule giving the surrogate jurisdiction, applies as well to demands held by an executor or administrator in a representative character, as to those held in his own right. There is the same incongruity in his suing himself in the one case as in the other, or in his adjusting, as the representative of two estates, a demand of one estate against the other, and the same propriety in both cases in granting jurisdiction to the surrogate. The fact that the plaintiff's husband is joined with her as administrator of one estate, and that she is the sole administrator of the other is not material. (*Shakespeare v. Markham*, *supra*.) The decree of the surrogate disallowing the claim being valid, and in full force, is therefore a bar to this action.

This leads to a reversal of the judgment.

All concur, except MILLER and TRACY, JJ., absent.

Judgment reversed.

Opinion of the Court, per DANFORTH, J.

CECILIA B. ST. CLAIR, Respondent, v. EDWARD P. DAY,
Appellant.

Plaintiff's claims herein amounted to \$406. Defendant set up a counter-claim of \$300, to which plaintiff interposed a reply. On the trial, which was before a referee, but little evidence was given in support of the counter-claim, and no request was made for a finding in its support. The report and the judgment was for just the amount of plaintiff's claims. *Held*, that this was the matter in controversy, and as the amount was less than \$500, an appeal to this court could not be taken.

(Argued May 30, 1882; decided June 6, 1882.)

MOTION to dismiss an appeal from judgment of the General Term of the City Court of Brooklyn.

The material facts are stated in the opinion.

H. C. Place for motion. To constitute a counter-claim, the pleadings must allege such facts as would constitute a good complaint in case the defendant was bringing the suit instead of the plaintiff. (*Vassar v. Livingston*, 13 N. Y. 252.) As the question of the pretended counter-claim was not argued or presented to the General Term, it was not "in dispute" so as to enable its amount to be considered in estimating the amount necessary to enable appellant to come to this court. (*Brown v. Sigourney*, 72 N. Y. 123.)

Edward P. Day opposed.

DANFORTH, J. By consolidating two actions, the plaintiff's claim was \$406. The defendant by answer set up a counter-claim for \$300. To this the plaintiff replied. It could not perhaps be said that no testimony was given by defendant bearing upon his claim, but it was hardly enough to attract the serious attention of the referee, and does not seem to have been given for that purpose. It could in no view warrant a finding in its support, and so the defendant must have thought, for no request was made in regard to it. The report in favor of the plaintiff was for the exact amount claimed by her, and so is the

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judgment. This is the matter in controversy, and as it is less than \$500, an appeal cannot legally be taken from it (New Code, § 191, subd. 3).

The motion to dismiss should be granted, with costs.

All concur, except TRACY, J., absent.

Motion dismissed.

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ANN FITZPATRICK, by Guardian, etc., Appellant, v. HENRY W. SLOCUM et al., Respondents.

Ministerial officers can only be made liable to an individual for damages caused by an alleged nonfeasance upon proof showing an omission on their part to perform a plain duty devolved upon them by law.

The commissioners appointed under the act of 1866 (Chap. 826, Laws of 1866) to grade and improve Union street in the city of Brooklyn, in the prosecution of the work constructed a swing-bridge on the street across Gowanus canal, and made and filed their report, and so transferred the bridge to the common council, as required by the act. No barriers were constructed to protect persons in the street from falling into the canal when the draw was open. Plaintiff, in endeavoring to save an infant brother who was about to go upon the bridge just as it was being swung open, slipped between the sidewalk and the bridge and was injured. In an action against defendants, the commissioners of the department of public works, to recover damages, it appeared that at the time of the accident the bridge and street were in the same condition as when transferred to the city, and that it was in charge of a keeper appointed by the police commissioners. Said keeper had previously notified the assistant engineer attached to the board of city works that the place was dangerous, and that two accidents had happened. *Held*, that defendants were not liable; that assuming they could be made liable for damages sustained by reason of defects negligently suffered to exist in a street by virtue of the provisions of the city charter of 1873 (Title 14, chap. 863, Laws of 1873), conferring upon the commissioners of said department the control and care of the city streets, no such liability was incurred here, as the street was in no sense out of repair, and the danger arose simply from the opening of the bridge by a keeper not under the control of defendants, but appointed by and under the control of the police board (see said charter, § 62, title 11), and defendants had no authority to appoint keepers to guard the approaches when the draw was open.

Also, that no liability was imposed upon defendants by the provisions of the act of 1874, amending said charter (§ 31, chap. 589, Laws of 1874) which

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requires the commissioners of the city works, in case any street becomes dangerous, to examine and repair the same, as neither the street nor the bridge were dangerous of themselves and were only made so by operating the latter.

It seems that the provision of said charter (§ 27, title 19), providing that the city shall not be liable for the misfeasance or nonfeasance of its officers, but that the officer guilty thereof shall be liable, does not exempt the city from liability for failure to discharge a duty resting upon it, and which it has not devolved upon any of its officers, and that the liability for not guarding the bridge sufficiently when it was being operated for public use rested upon the city, and the remedy is against it.

Gray v. City of Brooklyn (2 Abb. Ct. of App. Dec. 267), distinguished.

(Argued November 29, 1881 ; decided June 18, 1882.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made July 15, 1880, which affirmed a judgment in favor of defendants, entered upon an order dismissing the complaint upon trial.

The nature of the action and the material facts are stated in the opinion.

William G. Cooke for appellant. The fact that the bridge was built by a commission appointed by the legislature did not relieve the city or its officers from responsibility for its condition. (*Clifford v. Dam*, 81 N. Y. 52 ; *Congreve v. Morgan*, 18 id. 84 ; *Robinson v. Chamberlain*, 34 id. 389-390 ; *Brown v. C. & S. R. R. Co.*, 12 id. 486 ; *Sewell v. City of Cohoes*, 75 id. 45.) The board of city works is directly responsible for the dangerous condition of the bridge. (Laws of 1873, chap. 863, title 14, § 1, subd. 3 and 10, § 3, subd. 1 ; *Sewell v. City of Cohoes*, 75 N. Y. 45, 54 ; *Adsit v. Brady*, 4 Hill, 630, 633 and note ; *Hyatt v. Trustees of Rondout*, 44 Barb. 285 ; 41 N. Y. 619 ; *Springer v. Dwyer*, 50 id. 21 ; *Thayer v. Marsh*, 75 id. 342 ; *McKnight v. Devlin*, 52 id. 399, 404 ; *Clemence v. City of Auburn*, 66 id. 334 ; *Morgan v. Skiddy*, 62 id. 321 ; Laws of 1874, chap. 589, § 31.) It having been defendants' duty to keep this bridge and the adjacent street in safe condition, there was sufficient evidence given to carry the case to the jury upon the question of their

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negligence. (*Hyatt v. Trustees of Rondout*, 44 Barb. 385; *Healy v. The Mayor*, 3 Hun, 708-9-10; *Hover v. Barkhoff*, 44 N. Y. 113; *Requa v. City of Rochester*, 45 id. 129.) No notice was necessary under the circumstances of this case. (*Todd v. City of Troy*, 61 N. Y. 506; *Hover v. Barkhoff*, 44 id. 113; *McCarthy v. City of Syracuse*, 46 id. 194; *Requa v. City of Rochester*, 45 id. 129.) Want of funds is no defense; it was defendants' duty to obtain or at least apply for them. (*Hover v. Barkhoff*, 44 N. Y. 113.) A child seven years of age is not to be held to so strict a rule as to precaution as an older person; and it is to be submitted to the jury to determine what degree of care should be required of her. (*O'Mara v. H. R. R. Co.*, 38 N. Y. 445; *Thurber v. H. B. R. R. Co.*, 60 id. 326; *Eckert v. L. I. R. R. Co.*, 43 id. 502.) The rule that a child *non sui juris* by reason of its tender years, who is negligently permitted to run at large, is chargeable with the carelessness of its parents, and cannot recover for injuries inflicted through the negligence of others, is not applicable to this case. (*Thurber v. H. B. R. R. Co.*, 60 N. Y. 326, 332; *Drew v. Sixth Avenue R. R. Co.*, 26 id. 49; *McGarry v. Loomis*, 63 id. 104.)

Wm. C. De Witt for respondents. The defendants were not responsible for defects, if any existed, in the construction of the bridge where the accident occurred. (Laws of 1868, chap. 826, §§ 1, 2, 3.) If there was any official negligence, it was the neglect on the part of the department of police to furnish a sufficient number of keepers to manage the bridge with safety, which contributed to cause the accident and consequent injury of the plaintiff. (Laws of 1873, chap. 863, title 11, § 62.) The ordinary powers of the commissioners of city works to repair bridges and streets would not authorize the initiation of a radical alteration of a street improvement originated by the legislature, completed by a commission appointed by the legislature, and in that state handed over to the common council. (Laws of 1873, chap. 864, title 16, § 1, subd. 3, 8; Laws of 1873, chap. 963, title 14, § 1, title 2, § 13, subd. 4, § 26, title

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18, § 14; Charter 1873, title 4, § 21.) A specific appropriation by the common council was required. (Charter of 1873, title 6, § 1; *Garlinghouse v. Jacobs*, 29 N. Y. 297.) The plaintiff herself was guilty of contributory negligence. (*Hatfield v. Roper*, 21 Wend. 615.)

EARL, J. This action was brought against the defendants to recover damages sustained by the plaintiff in consequence of injuries received by her at the Union street draw-bridge in the city of Brooklyn. The bridge was constructed upon Union street across the Gowanus canal by commissioners appointed under the act, chapter 826 of the Laws of 1866. The commissioners appointed by that act were required to grade, pave and improve Union street according to a plan to be adopted by them, a part of which plan was a draw-bridge over the canal; and it was provided that after they had completed the improvements they should make a report to the common council of the city with a map and profile of the street as laid out and established by them, which were to be filed in the office of the street commissioner of the city, and that thereupon the street should be a public street and highway of the city and deemed to have been transferred to the common council and subject to its control in the same manner as other streets and avenues of the city. Under that act the street was improved and the bridge constructed and the report was made and filed as required, and thus the street and the bridge were transferred to the city.

It is provided in section 62 of title 11, chapter 863 of the Laws of 1873, that "The board of police shall appoint suitable persons as keepers of all bridges in the city of Brooklyn who shall perform all the duties and be subject to the regulations and ordinances of the common council. The said persons so appointed shall be under the direction and control of the board of police and excise and may be superseded at any time by the said board."

The bridge was built in 1866. It was about one hundred feet long and thirty feet in width, having two carriage-ways

and two foot-paths. Under the center was a pier upon which the bridge revolved. When it was swung open to allow a vessel to pass it stood at right angles with the street, parallel with the canal, leaving nothing to protect persons in the street which leads off directly into the water. There were no barriers of any description upon the street or sidewalk. The bridge and street were in the same condition as they were when transferred to the city upon the completion thereof by the commissioners appointed under the act of 1866.

The plaintiff, an infant, resided with her parents two doors from Union street and one block from the bridge. On the 10th of May, 1877, she left her home and started down Union street to look for her brother, a child four years old. When she discovered him he was going toward the bridge which was being swung to let a vessel pass. She followed and overtook him just as he was about to get on the bridge and she caught hold of him as he was stepping on and in doing so her foot slipped in between the sidewalk and the bridge and she sustained very serious injuries. Previous to this accident the keeper who was in charge of the bridge gave notice to the assistant engineer attached to the board of city works that the place was dangerous and unsafe and that two accidents had already occurred there. This notice was given at least six months before the plaintiff was injured.

The defendants were sought to be held liable because they were commissioners of the department of city works, under title 14 of chapter 863 of the Laws of 1873. By section 1 of that title it is provided that the commissioners shall have charge and control, subject to the direction of the common council, of opening, altering, regulating, grading, regrading, curbing, guttering and lighting streets, avenues, places and roads, flagging sidewalks and laying crosswalks, of paving and repaving and cleaning streets, avenues and places, and keeping the same clear of encroachments, obstructions and incumbrances; of the construction, altering and repairing of public structures, buildings and offices and all other public works under the care of the department; and it is further provided

that they shall have an annual salary. The claim on the part of the plaintiff is that, by virtue of the powers thus conferred upon the commissioners, they were responsible for the safe condition of the streets and bridges of the city.

At the time of the accident the bridge was actually in charge of one keeper appointed by the police commissioners. The defendants were ministerial officers, and before they can be made liable to any individual for damages caused by an alleged nonfeasance, the proof must show that they omitted to discharge a plain duty which the law devolved upon them. Assuming that they could be made liable for damages sustained by an individual by reason of defects negligently left or suffered to exist in any of the streets or bridges of the city, here Union street was in no sense out of repair. As a street for public travel it was in perfect condition, and the bridge over the canal was not defective, but was in all respects suitable for the purpose for which it was constructed. The street and bridge were completed by the commissioners appointed to construct them, and they were in as good condition at the time of the accident as when they were turned over to the city and to the charge of the commissioners of city works. The danger to which the plaintiff was exposed was caused by operating the bridge by the keeper appointed by the police commissioners. When the bridge was closed it was perfectly safe. When open children and other imprudent persons might walk from the street into the canal; but that was because the draw was opened by the keeper who was not under the control of the defendants. It is not plain from the facts appearing in this case precisely what the duties of the keeper of such a bridge are. They must depend somewhat upon the structure of the bridge and its appurtenances. He may be simply required to operate the bridge, or the duty may also rest upon him to guard the approaches when the draw is open. If the latter duty rested upon the keeper of this bridge, then the police commissioners should have appointed a sufficient number of keepers, if one was not sufficient, to properly discharge that duty.

It is said that the defendants ought to have built barriers at

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both ends of the bridge which could have been closed when the draw was open ; but who could be there to open and close them ? The barriers would be of no use without some persons in charge of them, to open them when the draw was closed, and to close them when the draw was open, and I do not find any thing in the statute which made it the duty of these commissioners, or which gave them the power to appoint keepers of any barriers which they might erect. And again if it was requisite to have keepers of barriers, then the barriers were unnecessary and it would have been sufficient to have stationed a person at each end of the bridge to watch and take care when the draw was open. If there had been a sufficient number of keepers of the bridge the bridge could have been sufficiently guarded so that no accident of the kind which occurred to the plaintiff could have happened. But I am of the opinion that the defendants are not guilty of nonfeasance for not appointing such keepers. The power to appoint them was conferred upon another department of the city.

I can, therefore, find no ground based upon statutes so far referred to for imposing responsibility for this accident upon the defendants.

It is claimed also on behalf of the plaintiff that the defendants are liable to her in consequence of a duty imposed upon them by section 31 of chapter 589 of the Laws of 1874, which provides that "in case any street, public building, highway, sidewalk, crosswalk or bridge shall become dangerous, the commissioners of the city works shall examine the same, and with the approval of the mayor shall cause the same to be repaired or removed, provided that the expense of such repair or removal shall not exceed in amount the sum of \$1,000 in any one case, and to meet such expenses the comptroller shall issue certificates of indebtedness, the payment of which shall be provided for in the next annual budget." Here the street did not become dangerous, and the bridge was not dangerous. It was operating the bridge that made it dangerous, and that section plainly had reference to no such occurrence. There was nothing in this

street to repair or remove; the street and the bridge were in perfect repair, and all that was needed to guard against every danger was that the draw should be operated with proper care and vigilance and the bridge kept guarded when the draw was open.

The claim is made on the part of the plaintiff that if these defendants are not liable to her then she has no remedy for the injuries which she has sustained, and our attention is called to section 27 of title 19 of chapter 863 of the Laws of 1873, which provides that "the city of Brooklyn shall not be liable in damages for any misfeasance or nonfeasance of the common council or any officer of the city or appointee of the common council, of any duty imposed upon them, or any or either of them, by the provisions of this act, or of any other duty enjoined upon them, or any or either of them, as officers of government, by any provision of this act, but the remedy of the party or parties aggrieved for any such misfeasance or nonfeasance shall be by *mandamus* or other proceeding or action to compel the performance of the duty, or by other action against the members of the common council, officers or appointee, as the rights of such party or parties may by law admit, if at all." Under this section it is said that no liability in a case like this can be enforced against the city, and that the only remedy for the party injured is against some one or more of the city officers. We are of opinion that the exemption created by this section is not so broad as claimed. There must be a remedy in such a case, where one is injured without fault of his own by a defect in one of the streets or bridges of the city, either against the city or some one of its officers. The primary duty to keep its streets and bridges in safe condition rests upon the city, and there is a general obligation upon it to use proper care and vigilance in putting and keeping its streets and bridges in such condition, and unless that duty has been plainly devolved upon some officer or officers of the city against whom a remedy for nonfeasance can be had, the remedy is against the city upon its obligation. That section does not exempt the city from liability to discharge a duty resting upon it and which it has not devolved

upon any one of its officers. If the commissioners of city works are not liable, as we hold they are not, and if there is no remedy against the police commissioners, for not appointing and keeping at this bridge sufficient keepers (and we are also inclined to think a remedy against them would fail), then the remedy is against the city upon its primary obligation to keep its streets and bridges in a safe condition, and for not guarding this bridge sufficiently when it was operated for public use.

The views here expressed are not in conflict with any thing decided in the case of *Gray v. The City of Brooklyn* (2 Abb. Ct. App. Dec. 267). It does not appear very clearly upon what ground that case was decided. It was a sufficient defense to the action that there was no negligence proven which was chargeable to the city; but if more than that was decided in order to exempt the city from liability, it was merely that where a plain duty was devolved upon certain officers, any one injured by a non-performance or imperfect performance of that duty should take his remedy against the officers and not against the city. It was not decided that where an absolute duty rests upon the city one who suffers injury from non-performance of that duty cannot, in any case, have his remedy against the city.

We have therefore reached the conclusion, not without doubt and hesitation, that the nonsuit was properly granted, and that the judgment should be affirmed, with costs.

MILLER, J. (dissenting). The defendants were commissioners of city works in Brooklyn, and the plaintiff claims to recover damages for injuries sustained by reason of the dangerous condition of a bridge which, it is alleged, it was the duty of the defendants to keep in repair and in a good and safe condition. The liability of the defendants is claimed to exist by virtue of the city charter (Chap. 863, Laws of 1873), which, it is insisted, expressly confides to this department the care of bridges. By title 14, section 1 of said charter, provision is made for organizing a department of city works consisting of a president and commissioners, and it is declared that "said commissioners shall have charge and control, subject to the directions of the

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common council," of various matters which are enumerated, and under subdivision 10, among other things, of the construction, altering and repairing of public structures, buildings or offices and all other public works under the care of said department." The power here conferred is quite full, but nevertheless is subject to the control of the common council. Although the board of city works is one of the departments recognized in the charter (Title 3, § 2) as well as in title 14, § 1, *supra*, it is, however, subject, to some extent at least, to the legislative power which is vested in the common council, which has authority over the affairs of the city and is "to supervise the affairs of all the departments and offices herein named." (Laws of 1873, § 13, subd. 2.) The qualification placed upon the powers of the commissioners would seem to put them under the control and direction of the common council to a certain extent, and in the exercise of the functions conferred by the charter, that body, if they deemed it advisable, could have the right to legislate as to the management and control which should be exercised over the same for the public benefit, although their powers were not absolute and the commissioners still retained certain independent functions.

The bridge was built under the directions of a board of commissioners by virtue of a special act of the legislature (Chap. 826, Laws of 1868) and in accordance therewith, upon the improvement being completed in 1871 or 1872, a report thereof was made to the common council, and it was provided that thereupon it would be deemed to have been transferred to said common council. According to the evidence at the time of the accident it was in the same condition as when handed over, and no doubt was subject to the same general rules and control as other structures of a similar character. In this connection some other provisions of the charter may properly be adverted to, and under title 11, section 62, the board of police were authorized to appoint suitable persons as keepers of bridges, who were to perform all the duties, subject to the regulations and ordinances of the common council, and a keeper of this bridge was appointed accordingly. It is thus apparent that

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it was the duty of the police department to provide the necessary keepers to manage and control the bridge in question, and had this been effectually done it is most probable that the accident in controversy would not have occurred. The bridge was supposed to have been in a completed condition when delivered, and no repairs were required so far as appears, but accidents may have been guarded against either by an additional keeper or by a gate or some obstacle or barrier which would prevent persons from being injured. Were the commissioners responsible that this was not done?

The common council, as we have seen, exercised a general direction and control over the department of public works and a supervision over the same. The city was liable for any contracts except, among other things, for the *repaving* of streets, and all contracts, other than for the purposes excepted, exceeding the sum of \$250, were to be made as provided by Laws of 1873, title 17, § 1, and the common council were required to make the necessary appropriation of money to keep the streets in repair. (Title 2, §§ 20 and 21.) Having in view the different provisions defining the power of the defendants, and those conferred upon the common council under the various statutes to which reference has been had, I cannot resist the conclusion that the commissioners had authority over the bridge in question. Their general powers cannot be questioned, and the restriction imposed, which places them under the control and direction of the common council, did not prevent their making the necessary arrangements to guard against accidents. Suppose the bridge had got out of place or had become unsafe on account of weakness or insecurity, or by accident, can there be any question that it was the duty of the commissioners to see to it and to provide safeguards for the protection of the public? The common council's duty was supervisory, but theirs was a positive duty. If the amount required for repairs was less than \$250, then they had the power to expend that sum. If beyond that sum, they should have applied to the common council for the necessary funds. They did neither, and hence were not relieved from responsibility, and it was a ques-

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tion of fact for the jury whether, under all the circumstances, they were negligent. Under the Laws of 1873 (Title 17, § 2), the commissioners were bound, with the approval of the mayor, in case any bridge "shall become dangerous" to cause the same to be repaired, and I am unable to perceive why this provision is not applicable to the case of a bridge which had, on a previous occasion, been the cause of accident of which notice had been given.

Although the police commissioners had appointed a keeper, it was confessedly an insufficient and an inadequate protection, and the defendants should have seen either that some effectual mode was adopted by appointing a sufficient number of keepers for such a purpose, or that some other means were provided by the interposition of some barrier or obstacle for protection from accident. As to this, however, it was for the jury to determine in view of the facts.

Nor can it be urged, we think, that such an appropriation could be said to be a local improvement within the meaning of the charter. (Title 18, § 21.)

If, however, a specific appropriation was required, it should have been applied for to avoid the allegation of negligence. The fact that the bridge was built under a special act of the legislature and handed over to the common council does not exonerate the defendants from the obligation imposed upon them or place it in any better or different condition than other similar city structures.

Nor is it entirely clear that the plaintiff was guilty of contributory negligence. As the case stood, we think the judge erred in granting the nonsuit.

The judgment should be reversed and a new trial granted, with costs, to abide the event.

All concur for affirmance, except MILLER, J., dissenting.

Judgment affirmed.

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GEORGE W. NICHOLAS et al., Appellants, v. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Respondent.

A shipping contract will not be construed as exempting the carrier from liability for his own negligence, unless the intent is so plainly and distinctly expressed as that it cannot be misunderstood by the shipper; it cannot be inferred from general words in the contract.

Plaintiff shipped a quantity of fruit trees by defendant's road; the shipping contract, among a great number of special exemptions from liability on the part of the carrier, contained the following, for "damage occasioned by delays from any cause or from change of weather." The trees were lost by the negligent delay of defendant in the transportation. In an action to recover damages, *held*, that such a loss was not covered by the exemption, and that defendant was liable.

(Argued April 17, 1882; decided June 13, 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 5, 1877, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

This action was brought to recover the value of a quantity of quince trees, shipped by defendant's road at New York city for transportation to Geneva, New York, and alleged to have been lost *en route* through the negligent delay of the defendant.

The material facts are stated in the opinion.

Arthur C. Smith for appellants. The release does not remove the defendant's liability for damage to the freight, resulting from its or its servants' negligence. (2 Redf. on Law of Railways [4th ed.], 90; *Cole v. Goodwin*, 19 Wend. 251; *Gould v. Hill*, 2 Hill, 623; *Hollister v. Nowlen*, 19 Wend. 234; *Nevins v. Bay State Stbt. Co.*, 5 Bosw. 225; *Camden, etc., Transp. Co. v. Belknap*, 21 Wend. 354; *Dorr v. N. J. Steam Nav. Co.*, 4 Kern. 485; *Bissel v. N. Y. C. R. R. Co.*, 25 N. Y. 445; *Germania F. Ins. Co. v. M. & C. R. R. Co.*, 72 id. 90; *Hill v. S. B. & N. Y. R. R. Co.*, 73 id. 351; Doct. & Stud.

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Dial, 2 Ch. 49; *Lyon v. Mells*, 5 East, 438; Angell on Law of Carriers [2d ed.], 275; *N. Y. C. R. R. Co. v. Lockwood*, 17 Wall. 357; *C. & M. R. R. Co. v. Selby*, 4 Ind. 471; *L. & C. R. R. Co. v. Hedger*, 13 Am. L. Reg. [N. S.] 145; *McManus v. L. & Y. R. R.*, 4 H. & N. 327; *Alexander v. Green*, 7 Hill, 544; *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Steinwig v. Erie Ry.*, 43 id. 123; *Guillaume v. H. & Am. P. Co.*, 42 id. 212; *Westcott v. Fargo*, 61 id. 542; *Mynard v. S. & B. R. Co.*, 71 id. 180; *Magnin v. Dinsmore*, 56 id. 168; *Edsall v. C. & A. R. R. Co.*, 50 id. 661; Lawson on Contracts of Carriers, 174, § 136; *Blair v. Erie Railway Co.*, 66 N. Y. 313; *McPadden v. N. Y. C. R. R. Co.*, 44 id. 479; *Condit v. G. T. R. R. Co.*, 54 id. 500; *Michaels v. N. Y. C. R. R. Co.*, 30 id. 564; *Bostwick v. B. & O. R. R. Co.*, 45 id. 712; *Rawson v. Holland*, 59 id. 611; *Heyl v. Inman Steamship Co., Limited*, 14 Hun, 564; *Michaels v. N. Y. C. R. R. Co.*, 30 N. Y. 564.) Aside from the construction of the release, the acts of the carrier, subsequent to its execution, deprived it of the benefits which it might otherwise have claimed under it. (*Acheson v. N. Y. C. & H. R. R. Co.*, 61 N. Y. 652; *Marshall v. N. Y. C. R. R. Co.*, 45 Barb. 502; *S. C.* affirmed, 48 N. Y. 660; Edwards on Bailm. [2d ed.], § 609; *Cooper v. Kane*, 19 Wend. 386; *Pest v. C. & N. W. R. Co.*, 20 Wis. 598; *Tirney v. N. Y. C. & N. R. R. Co.*, 76 N. Y. 305; *Keeney v. Grand Trunk R. Co.*, 59 Barb. 104; affirmed, 47 N. Y. 525.)

Wm. H. Adams for respondent. As it now stands, the question of negligence is not necessarily in this case. (*Am. Ex. Co. v. Smith*, 19 A. L. J. 77; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228.) This case is within the authorities, holding that for errors in judgment or even slight negligence the special contract is ample protection. (*French v. B. & N. Y. & E. R. R.*, 4 Keyes, 108; *Lee v. March*, 43 Barb. 102; *Wells v. Steam Nav. Co.*, 4 Seld. 375.) Common carriers may limit their common-law liability by stipulation or contract. (*Mynard v. S. B. & N. Y. R. R. Co.*, 71 N. Y. 180; *Magnin v.*

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Dinsmore, 56 id. 168; *Cragin v. N. Y. C. R. R. Co.*, 51 id. 61.) Defendant had a right to infer from the plaintiffs' acceptance of the receipt without dissent, that he assented to its terms. The circumstances imposed upon the plaintiff the duty to read it. (*Kirkland v. Dinsmore*, 62 N. Y. 171, 178; *Maghee v. C. & A. R. R. Co.*, 45 id. 514; *Long v. N. Y. C. R. R. Co.*, 50 id. 76; *Belger v. Dinsmore*, 51 id. 166; *Steers v. Liverpool S. S. Co.*, 57 id. 1; *Germania F. Ins. Co. v. M. & C. R. R. Co.*, 72 id. 90-93; *Pindar v. Resolute F. Ins. Co.*, 47 id. 114-119.)

ANDREWS, Ch. J. We have recently held in *Mynard v. The Syracuse, Binghamton & New York R. R. Co.* (71 N. Y. 180; 27 Am. Rep. 28), that a shipping contract, made by a common carrier for the carriage of live stock, whereby the shipper, in consideration of a reduced rate for the carriage, agreed "to release and discharge the carrier from all claims, demands, and liabilities of every kind whatsoever, for, or on account of, or connected with any damage or injury to, or the loss of said stock or any portion thereof, from whatsoever causes arising," did not operate to exempt the carrier from liability for loss occasioned by its own negligence.

The words "from whatsoever cause arising," were as broad and comprehensive as possible. The court, however, refused to construe them as covering a loss arising from the negligence of the carrier, not, as I understand the decision, because the words, in their ordinary signification and interpretation, did not include a loss of this character, but because it is a part of the rule, which in this State allows a common carrier to contract against his liability for negligence, that the contract must, in terms and expressly, exempt the carrier from liability on this account.

The practice of common carriers making special acceptances, exempting them from their ordinary responsibility, though contrary to the policy of the common law, liable to abuse, and productive of inconvenience, has obtained too long to be now questioned. In this State it has been extended so as to autho-

rize a special acceptance, exempting them from liability for their own negligence. But a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable, and, while the law does not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business, and the want of knowledge of the force and construction of contracts, on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed.

This case is an illustration. The plaintiff desiring to ship trees from New York to Geneva, applied to the defendant in New York, to have them carried, and a printed paper which occupies nearly two printed pages of the appeal book, is presented to him by the carrier as the shipping contract, containing a large number of special exemptions, and among others for "damage occasioned by delays from any cause, or change of weather." The plaintiff signs the paper, and the trees are, as we must assume upon the case, lost by the negligent delay on the part of the defendant and its servants in transporting them, and the defense is that the contract included an exemption from loss by the carrier's negligence. It may be admitted that a careful reading of the contract would apprise a person skilled in the interpretation of contracts, that loss by negligent delay was included. Some of the exemptions in the paper relate to extraordinary liabilities imposed upon carriers by the common law, not connected with fault on their part. But in case of loss by delay in the transportation, the carrier is not an insurer, and is by the common law liable only when the delay was negligent, and the argument is that the shipper must be presumed to have understood this, and therefore to have known when he signed the contract, that it was intended to cover a loss arising from negligent delay in transporting the property. This is theoretically true. But we think it may be safely assumed that in the great majority of cases it is practically

untrue, and shippers would not generally understand that the contract absolved the carrier from responsibility for the consequences of its own negligence. The circumstances under which contracts of this kind are usually made, preclude a careful consideration by the shipper of their language and effect, and it is not too much to require that the carrier who usually prepares the contracts in advance, and exacts the consent of the shipper as a condition of taking his property, shall, in explicit language, if he seeks to rid himself of the obligation of care, and free himself from responsibility for his own negligence, express this intention in his contract, and that it shall not be left to inference, argument or construction, from general language.

There is an almost unbroken line of judicial expression, to the effect that general words will not operate to exempt a carrier from liability for his own negligence. In *New Jersey Steam Navigation Co. v. Merchants' Bank* (6 How. U. S. 344), NELSON, J., referring to the contract in that case, said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care." In *Alexander v. Greene* (7 Hill, 533), where the carrier claimed exemption from liability for negligence, under a stipulation to tow plaintiff's boat, "at the risk" of the master and owners, it is said: "To maintain a proposition so extravagant as this would appear to be, the stipulations of the parties ought to be most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred." In *Wells v. Steam Navigation Co.* (8 N. Y. 375), Judge GARDNER says: "We held then, if a party vested with a temporary control of another's property, for a special purpose of this sort, would shield himself from a responsibility, on account of the gross neglect of himself or his servants he must show his immunity on the face of his agreement, and that a stipulation so extraordinary, so contrary to general usage

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and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given." JOHNSON, J., in *Magnin v. Dinsmore*, (56 N. Y. 168), says: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that be expressly stipulated." And in the case of *Mynard*, which contains the latest expression of this court upon the subject, it is said: "The carrier should not be released from the consequences of his own wrongful acts, under general words or by implication." In some of the cases cited, reference is made to the circumstance that the contract of exemption then before the court might have effect, without applying it to the case of negligence, but, this is referred to as ground for excluding the inference of an intention that that subject was in the minds of the parties to the contract. But the cases do not, we think, rest upon that circumstance, but as we have said before, upon the broader and more practical and satisfactory ground, that where the carrier claims to have been exempted by a special acceptance from liability for his negligence, or the negligence of his servants, he must in the language of GARDNER, J., "show his immunity on the face of his agreement."

We think the nonsuit was improperly granted at the Circuit, and that the judgment should be reversed and a new trial granted.

DANFORTH, FINCH and TRACY, JJ., concur; RAPALLO, MILLER and EARL, JJ., dissent.

Judgment reversed.

THOMAS KAIN, Respondent, v. JOHN G. SMITH, Appellant.

In the absence of notice to the contrary a servant has a right to assume the master will perform the duty imposed upon him, of furnishing proper, adequate and perfect implements and appliances necessary for the performance of any duty required of the servant.

Plaintiff was employed as a carpenter by defendant who was operating a railroad, he was directed to assist in loading car-wheels, which work was being done under the direction of a foreman. The car-wheels were in

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pairs, connected by an axle and standing on a track ; and were loaded by an implement called a "jigger," one end of which was placed upon the tracks, and the other upon the platform of the car. It was composed of two side pieces, corresponding with the rails of the track, connected by cross-bars ; the end upon the car, was furnished with hooks to hold it in place. One side of the jigger was worn off so as to make it shorter than the other ; the hooks were worn off and blunted so as not to hold firmly to the car, and the cross-bars were worn and loose. After two pairs of wheels were loaded, the others were run along the track so as to give them a headway before striking the jigger ; it was customary to load in this way. As the last pair was being loaded one end of the jigger slipped from the car, the wheels fell, struck and injured the plaintiff. Plaintiff had never before loaded car-wheels or seen them loaded, and did not know what a jigger was. Defendant's master-mechanic had, prior to the accident, been notified that the jigger was defective. In an action to recover damages, where these facts appeared, *held* (RAPALLO and EARL, JJ., dissenting), that the evidence tended to show plaintiff furnished an imperfect implement, and that the injury was occasioned thereby ; and so that the question of negligence and contributory negligence should have been submitted to the jury, and a nonsuit was error.

(Argued April 27, 1882 ; decided June 13, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 20, 1881, which reversed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial. (Reported below, 25 Hun, 146.)

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The case is reported, upon a former appeal, in 80 N. Y. 458.

Defendant was, at the time of the injury, one of the board of directors and managers of the Vermont Central railroad, and one of three of said board who were operating the Ogdensburg and Lake Champlain railroad, under a contract with that company. One Ames was defendant's master-mechanic at Ogdensburg, having power to employ men, and having charge of the machinery and appliances, he hired plaintiff as a carpenter and set him to work at the yard in Ogdensburg, under Forrest, the foreman of the carpenters.

The further material facts are stated in the opinion.

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Edward C. James for appellant. The burden was upon the plaintiff to show by competent proof, as an affirmative fact, that the injury was caused without any fault on his part. (58 N. Y. 250; 75 id. 332-3; 78 id. 480; 80 id. 622.) Where the circumstances point just as much to negligence of the injured party as to its absence, or point in neither direction, the plaintiff should be nonsuited. (75 N. Y. 332-3; 84 id. 62; 22 Hun, 78; *Stackus v. N. Y., etc., R. R. Co.*, 79 N. Y. 464.) Plaintiff, in entering the service, assumed the risks and perils incident to the use of the machinery and property of the employer as it then was, so far as such risks were apparent. (25 N. Y. 566; 49 id. 521, 534; 63 id. 447, 453; 76 id. 126.) Plaintiff, having failed to establish any negligence on the part of the defendant or his subordinates which caused his injury, was properly nonsuited on that ground. (*Henry v. S. I. R. R. Co.*, 81 N. Y. 376, 379.)

Leslie W. Russell for respondent. A railroad operator owes a duty to his employes which requires him to furnish adequate and proper machinery for the use to which it is to be applied, and to maintain it in like condition for their protection and safety. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Booth v. Same*, 73 id. 38; *Mehan v. Syracuse, Bing. & N. Y. R. R. Co.*, id. 585; *Steinway v. Erie Ry. Co.*, 43 id. 123; *Harvey v. N. Y. C. R. R. Co.*, 19 Hun, 556; *Stevenson v. Jewett*, 8 Weekly Dig. 4; 16 Hun, 210; *Salters v. D. & H. C. Co.*, 3 Hun, 338; *Ryan v. Fowler*, 24 N. Y. 410, 411, 414, 415; *Worster v. The Forty-second St. R. R. Co.*, 50 id. 203, 205; *Willy v. Malledy*, 78 id. 310; *Swords v. Edgar*, 59 id. 33; *Hawley v. N. C. R. R. Co.*, 82 id. 370; *Mehan v. S., B. & N. Y. R. R. Co.*, 73 id. 585.) If the defendants' negligence in furnishing the defective machinery caused the injury in part, he is not excused from liability if the negligence of a co-employe of the plaintiff in the use of it contributed to the accident. (*Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206.) In an action for negligence, to justify a nonsuit on the ground of contributory negligence, the undisputed facts must show the omission or commission of

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some act which the law adjudges negligence; the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *Hart v. The H. R. Bridge Co.*, 80 id. 622; *Payne v. T. & B. R. R. Co.*, 83 id. 572.) Even where the knowledge of defects comes to the servant, it is a question for the jury to decide as to whether his negligence amounted to a contribution on his part, and it is only in a very extreme case that the court will decide it to be a matter of law. (*McMahon v. Port Henry Iron Ore Co.*, 24 Hun, 48; *Sprong v. B. & A. R. R. Co.*, 58 N. Y. 56; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521, 536, 537; *Willy v. Malledy*, 78 id. 310; *Haroley v. N. C. R. R. Co.*, 82 id. 370.) The employe has a right to assume the suitable character of the machinery for all purposes for which it is furnished to be used. (*Stevenson v. Jewett*, 16 Hun, 210; *Swords v. Edgar*, 59 N. Y. 28, 33; *Willy v. Malledy*, 78 id. 310; *Mehan v. S., B. & N. Y. R. R. Co.*, 72 id. 585.)

DANFORTH, J. The plaintiff was nonsuited at the Circuit upon a ground not now claimed to be tenable, and the judgment was reversed and a new trial ordered by the General Term, because in their opinion the case was one proper for submission to the jury. Upon this appeal the learned and ingenious counsel for the defendant submits the following propositions as reasons for reversing the order and restoring the judgment. *First.* Plaintiff's negligence contributed to the accident. *Second.* There was no negligence on the part of the defendant or his subordinates, which caused the injury. The learned counsel has frankly accepted a recent decision of this court, as embodying the rule of law by which the defendant must abide in seeking for an answer to these propositions, viz.: "To justify a nonsuit on the ground of concurring negligence, the negligence must appear so clearly that no construction of the evidence, or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict the other way would have been set aside as against evidence. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464.)

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I have carefully examined the testimony in the light of the earnest argument of the appellant's counsel, and am unable to find any conduct of the plaintiff, which in judgment of law contributed to the injury. In this respect, so far as I can discover, we are in accord with the trial judge, as we are with the General Term. But what is the case? The defendant was, for the purposes of this question, a railroad proprietor, the employer and master of the plaintiff (80 N. Y. 458), and as such bound to furnish him, in the performance of any duty required at his hands, proper, adequate and perfect implements and appliances necessary for such proposed work. This obligation was implied as part of the contract of service, and in the absence of notice to the contrary, the plaintiff had a right to assume that it would be performed. Moreover, he was ignorant of the duties of his place, of the kind and proper qualities and fashion of machinery which would be given him to use. But of these things the defendant had knowledge. On that also the plaintiff might prudently rely.

Before the 1st of May, 1872, he was a sailor and carpenter. At that time he went into the defendant's employment in the capacity of a carpenter — a car repairer — and was placed under one Forrest, the "foreman in the old shop and yard," and on the day in question, May 27, 1872, was directed by him to go with others and get a certain implement called a "jigger," and load wheels upon a flat car. Before that time he had neither loaded car-wheels, nor seen any loaded, nor did he know what a jigger was. The car-wheels were two wheels fastened on an axle, together weighing upwards of twelve hundred pounds, and were then standing on the track, about one hundred and fifty feet from the car. The jigger was between ten and twelve feet long; the car three and one-half feet high; one end of the jigger was placed upon the car, the other on the track; six or seven men were engaged with the plaintiff in loading the wheels. "Forrest was there, seeing that the wheels were loaded. He was giving directions about it." They shoved two pairs of wheels up without running them on the track. Some one said, "the best plan was to run the

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wheels, give them a headway and they would run half way up the jigger without any shoving." Forrest was there, standing within ear-shot, close to the car. "This was done successfully with all but two pairs, when, as the plaintiff says, "the last pair we run up, the jigger fell off, and the wheel jumped round and broke my leg." He was between the rails on the track, and between the rails of the jigger. He says, "while I was lying there I looked at the jigger. I didn't know what it was that gave way and let the wheel down, and the first place I looked at was at the grabs that were on the end of the jigger—the hooks that go over and pass down. I saw that one of them looked blunt and short. It appeared to be about three-quarters of an inch thick at the edge where it should have been sharp. It was blunt instead of being sharp. * * * The jigger when it fell did not fall completely to the ground; one end of it hung on the car and the other end fell down. By the ends I mean what I call the grabs. The right side fell off, and the left remained on. When I was lying there on the ground I took particular notice in looking at the grab on the right side, to see what gave away, and I thought it looked shorter than the other one."

A jigger is described as consisting of two side pieces of equal length, two cross pieces with bolts or tenons through them, fastening to the side pieces, and iron hooks, or grabs, at one end, so pointed as to fasten on the car and keep the jigger in place. The end of the right side of this jigger was worn off, and so was shorter than the other, and the plaintiff says "that made a jump which caused the jar." That side swung from the car and the right wheel of the two fell from it. He saw this after, but not before he was hurt; did not before notice it. "The jigger," he says, "slipped down and the wheel jumped round and struck me on the leg."

Schrier testified that the jigger, if properly constructed, would fit square on to the track, and present no abrupt point; that, going at a slow run, if the jigger is properly constructed, there is no reason why the car-wheels should jump. "I should consider if it struck it on a run at all it would jump. I should

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consider it is according to the fastness of the run. I should not consider that if after a wheel has jumped up, it runs right along straight up the jigger, the fact that the running has been adopted to force it along, has any effect whatever upon the running up the rest of the way, if it was going all straight. *The jigger should be constructed so that the grabs should be sharp to hold them to their place, not necessarily too sharp, but sharp enough to hold them to the bed of the car; the weight of the wheels would hold them. I can't say how long they should be for a ten or twelve-foot jigger; long enough to hold, long enough so that they have a proper bearing on the car. They should not be blunt at the ends.*"

Curbeau testifies that he was one of those engaged at the same time with plaintiff in loading these wheels; it was his first experience in that business. He says, "the bottom end of the jigger, as it rested on the rail, was broomed up, affected in both ends and running along up the jigger. I mean by brooming up, as though you took a stick in your mouth and chewed it, and the end was broken off. It was an old break; one was broken off more than the other"; he thinks the right hand stringer. He says, "between the breaking, and what was worn off, I think there must have been two inches or more broken off. I mean," he says, "it was two inches short, it was partly broomed up six or eight inches, and all the way up the jigger where the wheel ran. Both sides were pretty well worn in the joints. Those cross bars were defective, the joints were loose, so that the jigger would weave in that way; if there was a heavy pressure come on one side or the other it would have a tendency to break up."

"By the court: That is that the cross bars were not firmly in the timber that constituted the main parts of the jigger?"

Answer. Yes, sir. The wood was also worn. I did not notice anything particular in regard to the grabs, any more *than they were short*. They were about an inch or an inch and an eighth in length, where the angle begins to the end of the grab. They were blunt. The thickness of the iron at the point was a quarter of an inch. There was no stick provided to go across, to my knowledge no rope was provided."

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The length of the jigger: This witness says the jigger was not long enough; it should have been fifteen or sixteen feet; "you could then load it with more ease and less danger." He loaded car wheels with this jigger. He had seen it fall off "may be two or three times before that."

The court: "That is, the jigger fell off from the car?"

A. "Yes, one side of it dropped off from the car while we were loading wheels. * * * I had noticed the condition of this jigger prior to this accident. Before this happened, I was looking at it one day — before this accident — about six months before the accident; I found out it was worn off and broomed up on the lower end there, and the cross bars going through the tenons were loose so that the jigger was going this shape — zig-zag."

The court: "The cross bars were loose in the side bars?"

A. "*Yes, sir; so that the jigger wobbled.* I noticed the grabs were too short and blunt. I told Mr. Forrest we had ought to have a new jigger made; the old one was played out. The reply that he gave me: he said that he hadn't lumber for to make a new one, that he would have to use the old one. He never spoke any thing more to me about it, nor I to him. This conversation with Mr. Forrest was about six months before this accident happened; somewhere in the fall of 1871. * * * The cars were never loaded without the men running the wheels up on the jigger to my knowledge; ordered to run them — I saw them loaded very frequently. I had some experience in loading car wheels. They could not load those car wheels without giving them a running start, without more help. They could not have loaded that car with those wheels without more help, without running them."

From this evidence it is obvious that the implement furnished was not a perfect implement, and it might well be found that it was used in the ordinary way, and that the wheels could not have been loaded in any different manner from that adopted. Indeed, it is assumed by the learned counsel for the appellant that the jigger was old and out of repair, and pointing to the proposition now before us — that of concurring neg-

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ligence, he says: "The plaintiff and his fellow workmen took this old jigger to load these wheels. The plaintiff was in a hurry to get away. Instead of rolling the wheels up the jigger carefully and slowly, as they first began, they got to running them down the tracks on the full run, making the jigger jump every time they struck it, and finally they knocked the jigger out of place and the wheels run off and hurt the plaintiff." It is not pretended that the plaintiff was guilty of the omission of any prescribed duty, or of any misconduct whatever; on the contrary he with his associates were working under the eye of the foreman, and for aught that appears, to his satisfaction.

Now as to the mode of getting the wheels into the cars: Can the law pronounce it negligent or careless? Had the plaintiff any reason for supposing it was not the proper way? He had been told to obey Forrest, who was giving directions about it. There was difficulty in getting the wheels up; some one said "run them up." The evidence would warrant a finding that this was said by Forrest. The plaintiff so understood it, and Forrest does not deny it. If he did not say it, he at any rate saw the process, and did not interfere. More than that, several wheels were run up successfully. Was the speed an improper one? On his direct examination the plaintiff says the run was to give them a headway. Did they do more than this? Were they, indeed, on "full run?" The evidence is, they were "run" to the jigger. Does this mean the highest rate of speed, or a less rate; and if the latter, how much less?

As to the jump of the wheels, the witness says the wheels gave a "little jump" as they struck the jigger—"may be an inch or a half an inch." He also says this was because one end of the jigger was shorter than the other. Nor is it certain, from the proof, that if the jigger had been of full and equal length, and in sound condition, it would not have carried the wheels to the car, despite the manner of loading it. Was there, in fact, any departure from the customary and proper mode of loading such bodies? But "the plaintiff was in a hurry to get away." Was that evidence of negligence? What is the

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testimony? He asked Forrest "if he would allow him to get off at five o'clock," and was told he could go when the wheels were loaded. What inference of undue haste does the law attach to this desire? What reason had the plaintiff, at any time, for supposing that it was less safe to load the wheels in one way than the other? One witness testifies, wheels were always so loaded; that it was so ordered. Had not the plaintiff the right to rely somewhat, and if so, to what extent, on the experience of the foreman, or even on that of his associates? Is the only inference fairly deducible from the facts one of negligence? If not the court could not declare as a matter of law that the plaintiff was guilty of it, and the case should have been submitted to the jury, not only to determine what the facts were, but the proper inferences to be drawn from them. (*Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 id. 464; *Payne v. Troy and Boston R. R. Co.*, 83 id. 572.)

Second: The evidence tends to show that the defendant did not furnish the plaintiff an adequate implement, and that the injury to him occurred thereby. The jigger was imperfect and had been for several months; one side was so worn or broken as to be shorter than the other; the bolts or tenons were loose; the whole machine "wabbled," or "weaved," or moved "zig, zag" when pressed; the grab-irons were so worn as to be blunted and of no use, presenting an end three-quarters of an inch on the surface where it should have been sharp. Whether the effect of these things was not to change the center of gravity of the wheels, and so throw a heavier weight upon one side of the jigger than it was intended to bear, and thus throw it from the car, and whether this result was aided by the want of a grip upon the car itself; whether indeed the accident was not altogether owing to these defects, was necessarily a question for the jury.

It is not denied that the defendant is chargeable with the neglect of Ames and Forrest, the master-mechanic and foreman, to discover and remedy the defects, if any existed. Nor could

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it well be denied. They were easily discovered; the jigger was in sight and seen daily by both of these agents of the defendant. Forrest indeed had direct notice that a new jigger was needed, "that the old one was played out." His excuse was that he had not timber to make a new one, and the old one must be used. This was before the accident.

It is said the plaintiff might also see the defects. True, but he did not know the effect of such deficiencies, and was, moreover, directed by his superior to get and use the implement, and whether under these circumstances he should be charged with knowledge and with negligence by reason of it, was also for the jury. (*Gibson v. Erie Railway Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *Abrahams v. Reynolds*, 5 H. & N. 143; *Senior v. Ward*, 1 El. & El. 385; *Hutchinson v. N. Y. N. & B. R'way Co.*, 5 Exch. 343-354.) The question was whether the plaintiff took ordinary care in doing the work intrusted to him, and in determining this he was entitled to appeal not only to the evidence, but to the general knowledge of the jury. The law cannot determine it. It has no code formulating the effect upon one's conduct of a desire for an early release from a day's labor, or regulating the rate of speed which, without imputation of negligence may be given to a moving body for the purpose of overcoming its inertia, and thus aiding its ascent on an inclined plane. It depends upon the application of the facts and circumstances proved, to the position of the party.

In this case the jury might have found that the plaintiff was in the exercise of ordinary care, without being chargeable with bias, prejudice or passion, and that an implement whose parts were of unequal length where they should have been equal, whose joints were loose and infirm where they should have been tight and steady, and whose grip-iron was so blunted that it would not hold, might be pronounced by them unsafe and unfit for the purpose to which it was devoted, and also find that the injury from which plaintiff suffered was caused thereby, without violating their duty.

We therefore concur with the General Term in thinking the whole case should have been submitted to the jury. The order

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appealed from should be affirmed, and under the stipulation the plaintiff must have judgment absolute.

All concur, except RAPALLO and EARL, JJ., who dissent.

Order affirmed and judgment accordingly.

DAVID LEVY et al., Appellants v. SOLOMON LOEB et al., Respondents.

Plaintiffs employed the defendants, who were brokers, to purchase for them a specified amount of U. S. bonds, the latter agreeing to loan and advance the purchase-price. Defendants purchased in their own names the amount of bonds specified, and reported to plaintiffs' a purchase on their account at a price greater than that paid, subsequently, without knowledge of the overcharge and upon an agreement on the part of defendants to carry the original bonds purchased for plaintiffs' account to a specified date at a rate of interest agreed upon, the latter paid certain charges for commissions and alleged expenses, and also \$10,000 on the purchase-price. Defendants before the time of credit expired sold the bonds purchased, without notice to, or the knowlege or assent of plaintiffs. *Held*, that upon obtaining knowledge of the facts plaintiffs were entitled to repudiate the purchase and to recover back the moneys paid.

Gruman v. Smith (81 N. Y. 25), and *Capron v. Thompson* (86 id. 418), distinguished.

Levy v. Loeb (15 J. & S. 61), reversed.

(Argued May 1, 1882; decided June 13, 1882.)

APPEAL from judgment of the General Term of the Superior Court, of the city of New York, entered upon an order made February 11, 1880, which affirmed a judgment in favor of plaintiffs' entered upon a decision of the court on trial at Special Term. (Reported below, 15 J. & S. 61.)

This action was brought to recover back moneys paid by plaintiffs under a contract for the purchase of certain United States bonds, which contract plaintiffs claimed a right to rescind because of non-performance on the part of defendants.

Defendants who where bankers and brokers were employed by plaintiffs to purchase for their account and risk, \$100,000 of "United States sixes" of 1881, and the same amount of United States bonds of 1867. It was agreed that the purchase-price was

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to be loaned and advanced by defendants, at a specified rate of interest, the original bonds so purchased to be held as collateral and to be carried for plaintiffs' account. The bonds of 1881 were bought by defendants in Frankfort, in their own name through agents there, on February 16, 1881. On February 18, defendants gave plaintiffs notice of a purchase on their account at a price which made the amount of the purchase \$577.82, more than the actual cost of the bonds; this was explained as made up of sums paid for insurance and a charge for commissions for purchasing the bonds in Frankfort, called "courtage" which was not in fact paid. The bonds of 1867 were bought by defendants in June, 1876, they rendered an account of the purchase for \$31.25 more than was actually paid. Defendants carried the bonds until March 30, 1877, at which time they rendered an account to plaintiffs, who relying thereon paid on account the sum of \$10,746.74, and defendants in consideration thereof agreed to carry the original bonds until June 30, 1877, which time was afterward extended to January 2, 1878. Before that time defendants sold the bonds for their own account without the knowledge or consent of plaintiffs. On January 9, 1878, defendants demanded payment of the balance of the account with notice that upon default, the bonds would be sold the next day for account and risk of plaintiffs and on that day defendants sold the amount so purchased of similar bonds. Plaintiffs did not discover the excessive charges or the prior sale until after the last sale. Defendants set up as a counter-claim the deficiency arising on the second sale. The Special Term disallowed the counter-claim and directed judgment in favor of plaintiffs for \$713.77, being the amount of the charges in excess of the sums paid on said purchases with interest. Plaintiffs appealed from that portion of the judgment which disallowed them the balance of the sum so paid by them. Defendants appealed from that portion which disallowed their counter-claim. The appeals were argued and decided separately. The case on the appeal of the defendants from judgment of General Term affirming the judgment on their appeal is reported in 85 N. Y. 365. Further facts appear in the opinion.

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Lewis Sanders for appellants. Plaintiffs are entitled to recover, there being a total failure of consideration. (*Griggs v. Austin*, 20 Mass. 22; *Goodwin v. Gilbert*, 10 id. 510; *Carter v. Carter*, 31 id. 429; *Hill v. Rewell*, 11 Metc. 271; *Harrison v. Chilton*, 5 Gugen, 293; *Wheeler v. Beard*, 12 Johns. 364; *Giles v. Edwards*, 7 Term R. 181; *Richards v. Allen*, 17 Me. 299.)

Will Man for respondents. A witness, who personally knows nothing of a transaction itself, cannot be allowed to read or testify from private books or memoranda. (*Halsey v. Sinsebaugh*, 15 N. Y. 485; *Marclay v. Shults*, 29 id. 346.)

MILLER, J. Upon the former appeal in this case this court held that the counter-claim set up by the defendants for a deficiency arising upon the sale of the bonds alleged to have been purchased by them for the plaintiffs, was properly rejected upon the ground that substantial performance was a condition precedent to the right of recovery, and that this was not shown. It was also held that certain other bonds having been purchased by defendants under the same agreement, and the plaintiffs having been charged a commission for buying and the defendants having received a commission from the sellers, that the taking of these commissions on both sides was a breach of the contract.

The plaintiffs recovered upon the trial for two erroneous and illegal items charged to and paid by them, one of \$577.82 being a charge for insurance on bonds, which had not been paid or incurred, and for commissions in purchasing bonds in Frankfort, and the other item of \$31.25 being the excess of the amount paid on the last purchase of bonds, together with the interest on these several illegal sums.

Upon this appeal the plaintiffs claim that there was error in not allowing to them the sum of \$10,746.74, paid by them to the defendants on the 30th day of March, 1877, upon an account rendered to them by the defendants, including the illegal items for which a recovery was had by the plaintiffs, in which account the defendants claimed \$240,746.74 as due them

from the plaintiffs. The judge found that the plaintiffs, relying upon this account as correct, which account was then stated between the parties, paid the defendants the above-mentioned sum, and *in consideration* thereof they agreed to carry the original bonds for the plaintiffs to the 30th of June, 1877, which agreement was renewed and extended until January 2, 1878, at a rate of interest which was also agreed upon. An additional finding was also made to the effect that the defendants after the 13th day of March, 1877, and before the 2d day of January, 1878, for their own account, without the knowledge or consent of the plaintiffs, sold the whole of the original bonds. That the plaintiffs did not discover that the defendants had bought the bonds at one price and charged them at an advance of \$607.07, and had sold them on their own account before January 10, 1878.

In brief it appears, and in substance is found, that instead of performing their contract of agency the defendants purchased the bonds in question, in their own name at prices stated, and then charged them to plaintiffs at higher prices, and reported the purchases as made for them at those enhanced prices; relying upon this false statement and in consideration of the agreement to carry the bonds as above stated, plaintiffs paid the sum called for. No such purchases were made as reported, and upon discovery of this fact clearly the principal was authorized and justified in repudiating the fictitious transaction reported. It was upon this ground that the former appeal from that portion of the judgment rejecting defendants' counterclaim was sustained (85 N. Y. 365), and it is this which distinguishes the case from *Capron v. Thompson* (86 N. Y. 418); and from *Gruman v. Smith* (81 N. Y. 25), wherein we held that the unauthorized sale by a broker of stock purchased and carried on a margin was not a breach of a condition precedent which prevented the broker from charging for the purchase of the stock, and was not a defense to an action to recover the purchase-price, but that he was liable in damages for the unauthorized sale. Here was a failure to perform the contract of purchase; a breach of a condition precedent. As said by FINCH,

J., on the former appeal, "the agents instead of buying for account and risk of their principal alone, bought these bonds on their own account, at a fixed price, and held them for the principal at a larger price, and for the profit which was meant to be realized."

It is apparent from some of the findings to which reference has been had, that the defendants violated the contract of agency entered into between them and the plaintiffs; they also were chargeable with a breach of the contract by which they agreed with the plaintiff to carry the bonds for them upon the terms stated until the 2d day of January, 1878. In disregard of this condition, and before the time had arrived up to which they were to carry the bonds, the defendants as the court found disposed of the bonds. The sum of \$10,746.74, was paid by the plaintiffs as a consideration of the agreement to carry the original bonds. This money was paid expressly for this purpose, and both the plaintiffs and the defendants understood that the bonds were to be retained and carried for the benefit of the plaintiffs until the time specified by the agreement, and the defendants were bound to carry the bonds as agreed. The money was paid with this object in view, and the plaintiffs then understood that the bonds were to be kept for their benefit until the period named, and the defendants agreed that this should be done. They utterly failed to perform this part of their duty, and in violation of the plaintiffs' right, without the plaintiffs' knowledge and consent, and without even notice to them exposed the bonds for sale, and sold the same. This clearly the defendants had no right to do, and this act must be regarded as a rescission of the contract by them.

Looking at the transaction in the light most favorable to the defendants, they stood in the position of vendors. Where the vendor of property, who has received a portion of the purchase-price, on agreement to hold and deliver the property to the vendee on payment of the balance, without notice to the vendee disposes of the same, he may be treated as wrongly rescinding the contract on his part, and the vendee may maintain an action to recover the money paid in part performance of such con-

tract. (*Monroe v. Reynolds*, 47 Barb. 574; *Raymond v. Bearnard*, 12 Johns. 274; *Fancher v. Goodman*, 29 Barb. 315.) By the failure to perform the contract on the part of the defendants there was a total failure of the consideration paid by the plaintiffs for carrying the stock, and it became of no avail by reason of the defendants' unlawful act. The plaintiffs lost the benefit of the time named in the disposition of the bonds, and the amount paid by them, therefore, did not prevent the defendants from making a sale in disregard of the plaintiffs' rights. The consideration paid was received by defendants without any return for the same, and without any advantage conferred upon the plaintiffs as was intended. As the defendants rendered no service on account of the money paid, failed to carry the bonds, and neglected to perform the obligation assumed by them, it is obvious that they are lawfully bound to refund the money thus paid them, and the plaintiffs were entitled to recover the same.

The construction we have placed upon the obligation of the defendants is also, we think, fully supported by the decision of this court on the first appeal. As we have seen, the court rejected the defendants' counter-claim upon the ground that the contract was not substantially performed by them in any of its essential elements, and it is laid down in the opinion that they broke the contract by taking commissions on both sides and by not carrying the original bonds as agreed. While the taking of commissions as held may of itself have constituted a breach, and on the former appeal was properly to be considered in answer to the claim of the defendants to recover a counter-claim, as there is no finding that the defendants had received such commissions, and inasmuch as the court refused so to find, the question in regard to such commissions is not now before us. Nor is it necessary to pass upon that question, inasmuch as it already appears that the failure to carry the bonds by the defendants was a rescission of the contract which rendered them liable to refund the money.

While for the error pointed out a new trial should be granted, we think that this is not a case where the plaintiffs are entitled

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to a judgment for the full amount claimed in addition to that already recovered. The entire evidence is not before us, and it is not so clear that upon another trial there may not be such a change in the testimony as will alter the aspect of the case, and under such circumstances a new trial should be had.

It is not obvious how the judgment already affirmed can stand if a new trial is granted, and we think it must be vacated by a reversal.

The judgment should therefore be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO, who concurs in all save the rule of damages, and ANDREWS, Ch. J., and TRACY, J., who take no part.

Judgment reversed.

80 302
144 400

In the Matter of the Petition of WILLIAM T. BLODGETT et al.,
to Vacate an Assessment.

The provisions of the act entitled "An act in relation to regulating and grading the Eighth avenue in the city of New York," (Chap. 593, Laws of 1870), which authorize the commissioners of public parks to change the grade of streets intersecting said avenue to conform to the grade thereof, are void, as the including them in the act renders it repugnant to the constitutional provision (State Const., art. 3, § 16) declaring that a local or private bill shall embrace but one subject, and that shall be expressed in the title.

Accordingly *held*, that an assessment for grading an intersecting street, which work was done under said provisions, was void.

In re Blodgett et al. (27 Hun, 12), reversed.

(Argued May 30, 1882; decided June 13, 1882.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 10, 1882, which reversed an order of Special Term vacating an assessment "for regulating, grading, curb, gutter and flagging Eighty-second street between Eighth avenue and the Boulevard." (Reported below, 27 Hun, 12.)

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The grade of said street was originally established in 1853, it was changed by the commissioner of public works, and the work for which the assessment was laid was done to conform the grade with that of Eighth avenue under claim of authority given by the act chapter 593, Laws of 1870.

Charles E. Miller for appellants. Chapter 593 of the Laws of 1870, under which the commissioner of public works claimed the power to change the grade, as he actually did in 1870, is, so far as Eighty-second street is concerned, unconstitutional as not expressing its subject in its title. (*Town of Fishkill v. Plank-road Company*, 22 Barb. 634; *People v. Hills*, 35 N. Y. 449; *Baldwin v. Mayor*, 2 Keyes, 387-392; *People v. O'Brien*, 38 N. Y. 193; *Smith v. Mayor*, 7 Robt. 190; *Pullman v. Mayor*, 54 Barb. 169; *Gaskin v. Meek*, 42 N. Y. 186; *People v. Com'rs of Highway, etc.*, 53 Barb. 70; *People v. Allen*, 3 Hand. 404-417; *People ex rel. Lee v. B'd of Supervisors of Chautauqua Co.*, 4 id. 10; *People ex rel. Pratt v. Com. Council of Brooklyn*, 13 Abb. [N. S.] 121; *People v. Briggs*, 50 N. Y. 553; *Huber v. People*, 49 id. 132; *In Matter of Sackett, etc., Streets*, 74 id. 95.) This is not a case for a reduction of the assessment. (*In re P. E. School*, 75 N. Y. 324; *People v. Haines*, 49 id. 587.)

J. A. Beall for respondent. The grade of 1868 was lawfully established. (*In re Walter*, 83 N. Y. 538.) The conforming of the grades of the intersecting streets to the new grade of the Eighth avenue was a part of the subject expressed in and was indicated by the title of the act of 1870, chapter 593. (*In re Mayor*, 50 N. Y. 504; *Brewster v. Syracuse*, 19 id. 116; *People v. Lawrence*, 36 Barb. 192; *City of Rochester v. Briggs*, 50 N. Y. 553; *In re Van Antwerp*, 56 id. 261-7; *Nuendorf v. Duryea*, 69 id. 557; *In re Met. Gas-Light Co.*, 85 id. 526; *Gloversville v. Howell*, 70 id. 287; *Harris v. The People*, 59 id. 599; *People v. Banks*, 67 id. 568; *In re One Hundred and Thirty-eighth St.*, MSS.;

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In re Volkening, 52 N. Y. 650; *Brewster v. Syracuse*, 19 id. 116; 27 Ill. 534; 53 Penn. St. 391.) Even if the grade of 1870 was illegally established, the assessment should not have been vacated as the alleged invalidity would affect only the work done between the Eighth and Ninth avenues, and the extent of the relief which could be lawfully given would be to deduct from the assessment the cost of the work rendered necessary by such change of grade. (Laws of 1870, chap. 383, § 27; *In re St. Joseph's Asylum*, 69 N. Y. 353; *In re Merriam*, 84 id. 596; *In re Met. G. L. Co.*, 85 id. 526; *In re Upson*, MSS.) The objections to the assessment because flagging was laid but four feet wide, and because of the provision in the contract that work rendered necessary by a change of grade should be done at contract rates, do not constitute substantial errors within the acts of 1874, chaps. 312 and 313. (*In re Garvey*, 77 N. Y. 523; *In re Second Ave. M. E. Church*, 66 id. 375.) This was a case for a reduction of the assessment. (*In re Walter*, 83 N. Y. 538; Laws of 1870, chap. 383; *In re Merriam*, 84 N. Y. 596, 606; *In re Met. G. L. Co.*, 85 id. 526; *In re Hebrew Asylum*, 70 id. 476; *In re St. Joseph's Asylum*, 69 id. 353; *In re Upson*, MSS.) The change of the grade between the Eighth and Ninth avenues in no way affected the assessment upon the petitioner's lots, and he is, therefore, not aggrieved by the assessment by reason of such grade, within the meaning of the statutes authorizing this form of proceeding. (Laws of 1858, chap. 338; Laws of 1870, chap. 383, § 27; Laws of 1872, chap. 580, §§ 6, 7; Laws of 1874, chaps. 312, 313; *In re Merriam*, 84 N. Y. 596, 606; *In re Met. G. L. Co.*, 85 id. 526; *In re Upson*, MSS.; *In re Roberts*, 25 Hun, 371; Laws of 1880, chap. 550.) The petitioner is entitled to no greater relief than he could obtain before the commission created by chapter 550 of the Laws of 1880, and having proved no excess of cost or other damage, is not in this case entitled to relief. (*In re Bassford*, 50 N. Y. 509; *In re Eager*, 46 id. 100; *In re Ingraham*, 64 id. 310; *In re Hebrew Asylum*, 70 id. 476; *In re Roberts*, 81 id. 62-68.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. I think this appeal must prevail. The assessment in question was for "regulating, grading, curb, gutter and flagging Eighty-second street between Eighth avenue and the Boulevard," and is to be sustained, if at all, by the authority of the statute entitled, "an act in relation to regulating and grading the Eighth avenue in the city of New York," chapter 593, Laws of 1870. It provides that "Eighth avenue, from Fifty-ninth street to One Hundred and Twenty-second street shall be regulated, graded and improved according to certain grades therein stated; and that the commissioner of public works shall have power, within six months from and after the passage of this act, to change the grade between the Eighth and Ninth avenues of any streets intersecting the Eighth avenue between Fifty-ninth and One Hundred and Twenty-second streets, in such a manner as will best make such grades *conform to the grade of the Eighth avenue.*"

This is evidently a local act, and therefore should embrace only one subject, and that subject should be "expressed in the title." (Constitution of N. Y., § 16, art. 3.) I am unable to find any answer to the appellants' contention that the act is repugnant to this provision. If the title is examined, it is seen to be plain and unambiguous; it presents to the reader a subject which will attract the attention of any person concerned with the streets or avenues of the city to which it relates, and quiet the apprehensions of any one whose property interest is not within the limits of the Eighth avenue. [It would be unprofitable to analyze here the various cases referred to by the learned counsel for the respondent, as sustaining the law in question, for not one of them embraces the fact on which his proposition must depend, and that lacking, we are to ascertain whether there is any thing in the title which signifies, or by any process of philological deduction, can be made to signify that any street other than Eighth avenue is to be affected by the enforcement of the act. It is specific and brings to the mind of the citizen an avenue and its improvement. Its grade may be made perfect according to the terms of the statute, without aid from the arrangement of other streets, and so it is

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contemplated by the act; for the intersecting streets are by its terms to be made "to conform to the grade of Eighth avenue."

✧ In a certain general sense every street in a city is affected by a change made in any one of them, either in its grade or other mode of improvement; so by the erection of public buildings, the locations of markets or parks, or other places to advance business, or provide recreation, but it would, I think, hardly be pretended that any of these objects could be attained under an act whose title was limited like the one before us. Of all the cases cited by the respondent that of *The City of Rochester v. Briggs* (50 N. Y. 553), may be selected as best fitted to serve its purpose. There under an act entitled "an act to amend the several acts in relation to the city of Rochester," a variety of topics were introduced into separate sections, relating to the city government, taxes, the creation of new offices, confirming the action of the common council in relation to certain improvements in Lake avenue, the location of a railroad track at the side instead of the middle of the street, and even authorizing certain water commissioners "to contract with the trustees of any village" through which "the water pipes of the city were laid for the supply of such villages with water," and in case such contract was made, empowered "the village authorities to levy and collect the annual expense thereof with the annual tax of the village." The act was sustained against the objection presented here upon the ground that the title expressed the government, or character, or corporation of the city of Rochester, and hence the bill might embrace all these minor subjects. But even then the court say, "In an act in relation to Lake avenue, it would not be competent to insert provisions respecting Mount Hope avenue. As to such a bill Lake avenue would be the subject." It is true that this form or aspect of the question was not then before the court, but in view of the extensive argument upon which the conclusion in the case was reached, the proposition is of considerable force, and entitled to more weight than a mere illustration. Indeed if the constitutional inhibition is to be considered as having any force or meaning, it must be held as applying to the act before

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us. The improvement or alteration in any mode of the intersecting streets, is not fairly or reasonably connected with the improvement or regulating of Eighth avenue, nor would any measures adopted in reference to those streets facilitate the accomplishment of the purpose expressed in the act. The subject matter of the statute which permitted the assessment complained of is foreign to that indicated by the title, and the act in that respect must be pronounced invalid. This conclusion makes it unnecessary to consider other questions raised by the appellants, and requires that the judgment of the General Term should be reversed, and that of the Special Term affirmed.

All concur, except FINCH and TRACY, JJ., absent.

Judgment accordingly.

THE MARKET NATIONAL BANK, OF NEW YORK, appellant, v.
THE PACIFIC NATIONAL BANK OF BOSTON, MASSACHUSETTS,
Respondent.

Under the provisions of the Code of Civil Procedure in reference to service of summons by publication (§§ 440, 441, 787), such service is not complete until the expiration of at least six full weeks from the time of the first publication, or, when service is made out of the State, until the expiration of that period after such service.

Where, therefore, after the granting of an order of publication, summons was served on defendant out of the State on November 25, 1881, and judgment by default was entered January 20, 1882, *held*, that the judgment was premature; and that an order setting it aside was properly granted.

(Argued May 30, 1882; decided June 13, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made at the March term, 1882, which reversed an order of Special Term denying a motion to vacate and set aside a judgment by default herein, and which granted said motion.

The material facts are stated in the opinion.

Opinion of the Court, per MILLER, J.

Abram Wakeman for appellant. Under section 441 of the Code of Civil Procedure a service of summons by publication is complete after six insertions in six successive weeks, although less than forty-two days intervened. (Code Cr. Proc., §§ 440, 441; Code Proc., § 137; *Sheldon v. Wright*, 7 Barb. 40, 46; 5 N. Y. 497, 517; 21 id. 150; *Chamberlain v. Dempsey*, 13 Abb. Pr. 421; *Wood v. Terry*, 4 Lans. 80; *Steinle v. Bell*, 12 Abb. Pr. [N. S.] 172, 174.)

John T. McDonough for respondent. The order of the General Term vacating the order of the Special Term is not appealable to this court. (*Footte v. Lathrop*, 41 N. Y. 359; *Koch v. Werder*, 24 Alb. L. J. 453; *Beards v. Wheeler*, 76 N. Y. 213; *Dinsmore v. Adams*, 66 id. 618.) Under the provisions of section 5242 of the United States Revised Statutes, an attachment issued against a National bank which is insolvent or about to become so, is void. (*Robinson v. Bank of Newbern*, 81 N. Y. 385; *Chesapeake Bk. v. First Nat. Bk.*, 40 Ind. 269; *Nat. Bk. v. Colby*, 21 Wall. 609; *Harvey v. Allen*, 16 Blatch. 29; *Casey v. Adams*, 102 Otto, 66; *Crocker v. Marine Bk.*, 101 Mass. 240; *Bk. of Bethel v. Pahquiogue*, 14 Wall. 383; *Coddle v. Tracy*, 11 Blatchf. 101; Code of Civil Proc., § 1217.) The time of the defendant to answer had not expired, and consequently the entry of the judgment was irregular. (*Brooklyn Trust Co. v. Bidmer*, 49 N. Y. 84.) Service was not complete until the expiration of forty-two days. (*Tomlinson v. Van Vechten*, 6 How. Pr. 199; *Brod v. Heyman*, 3 Abb. [N. S.] 396; *Richardson v. Bates*, 23 How. Pr. 516; New Code, §§ 440, 441, 787; Old Code, §§ 135, 137; Note to § 441 [Throop's ed.]; *Steinle v. Bell*, 12 Abb. Pr. [N. S.] 171; *Rorkenderf v. Taylor*, 4 Peter, 349; *Howard v. Hatch*, 29 Barb. 297, 301.)

MILLER, J. There was an order of publication in this case, which was commenced by attachment. The summons and complaint were served on the defendant, who was a non resident, out of the State, on the 25th of November, 1881, and judgment was entered on the 20th of January following. A

Opinion of the Court, per MILLER, J.

motion was made at Special Term to vacate the judgment which was denied and upon appeal the General Term reversed the order and vacated and set aside the judgment.

Under the provisions of the old Code, section 135, it is declared that, “ * * * the order must direct the publication to be made in two newspapers * * * for such length of time as may be deemed reasonable — not less than once a week for six weeks. * * * When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post-office.” It is further provided by section 137, that, “the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication.”

There has been some conflict in the decisions in regard to the construction to be given to the language of the statute or to words of a similar import in other statutes. (*Sheldon v. Wright*, 7 Barb. 40; affirmed on appeal, 5 N. Y. 497, 517; *Bunce v. Reed*, 16 Barb. 347; *Olcott v. Robinson*, 20 id. 148; reversed on appeal, 21 N. Y. 150; *Richardson v. Bates*, 23 How. Pr. 516; *Chamberlain v. Dempsey*, 13 Abb. Pr. 421; *Brod v. Heymann*, 3 Abb. Pr. [N. S.] 396; *Wood v. Terry*, 4 Lans. 80; *Wood v. Morehouse*, 45 N. Y. 369.) The cases of *Wood v. Morehouse* and *Olcott v. Robinson* decided in this court uphold the doctrine that upon a sale of real estate under an execution, the publication for six weeks successively before the day of sale is within the statute to which it relates although the full period of forty-two days has not expired since the first publication. It is no doubt the rule under the old Code that where the summons was served personally, without the State, the service was not complete until the time for publication had expired, and the defendant had twenty days thereafter to answer (*Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84), but the precise question has never been decided in this court when the time expires, when the service has been made by publication. The two cases last above cited relate to the sale of real property where there is no provision fixing the time when the service shall be complete as provided by section 137

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(*supra*). It will also be noticed that some of the cases cited clearly uphold the rule that when the order directs the publication of a summons once in each week for six weeks, the time is not complete until the expiration of forty-two days. (See *Brod v. Heymann*, 3 Abb. [N. S.] 396; *Richardson v. Bates*, 23 How. Pr. 516.)

The provisions of the new Code are more definite and specific, and the question as to their construction is an open one. Section 440 provides for publication for a *specified time*, not less than once a week for six successive weeks. The number of weeks is specified and not the number of times. Section 441 declares that the time shall be complete upon the day of the last publication, and section 787 that the period of publication must be computed so as to include the day which completes the *full period of publication*. It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks. The publication evidently means rather more than printing the notice. Its object is to give notice by means of the newspapers, and it cannot be claimed that such notice is given for six weeks before that time expires. Looking at the various provisions referred to, it is a reasonable construction that the law intended a full six weeks' publication and not six times in six different weeks. If it were otherwise the time would vary and lead to confusion, and the defendant might not at all times know when it would expire as the summons need not be published on the same day in each week. (*Steinle v. Bell*, 12 Abb. Pr. [N. S.] 171.)

In cases where service of process is made by publication it is of no little importance that the time of its expiration should be fixed and certain, and we think that such was the intention of the provisions cited in reference to such service.

The order should be affirmed.

All concur, except FINCH and Tracy, JJ., absent.

Order affirmed.

In the Matter of the Administration of the goods and chattels
of BENJAMIN CURSER, deceased.

The provision of the act of 1867 in reference to the authority and jurisdiction of surrogates (§ 2, chap. 782, Laws of 1867), which provides that a married woman shall be capable of acting as an administratrix and of receiving letters as such the same as if unmarried, did not repeal the provision of the Revised Statutes (2 R. S. 74, § 28), giving a preference in the granting of administration to unmarried over married women of equal degree of kindred.

The said act frees the married woman from pre-existing disabilities and so can have effect without disturbing the statutory order of appointment, and the two enactments are not necessarily inconsistent.

Accordingly *held* where a surrogate issued letters of administration to one of two sisters who was unmarried, without notice to the other, who was married, that the provision of the Code of Civil Procedure (§ 2662) requiring notice to every person having a prior or equal right did not apply and that the appointment was valid.

In re Curser (25 Hun, 579) reversed.

West v. Mapes (4 Redf. 496), overruled.

(Argued May 30, 1882 ; decided June 13, 1882.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of December, 1881, which reversed two orders of the surrogate of Westchester county, one of which denied the petition of S. Cecelia Baxter asking for the revocation of letters of administration before that issued to Martha E. Varian, as sole administratrix of the estate of Benjamin Curser, and for the issuing of joint letters to the said petitioner and said Martha E. Varian ; the other refused to grant joint letters. The order of General Term also vacated and set aside the letters so granted. (Reported below, 25 Hun, 579.)

The two applicants were sisters and the only surviving children of the deceased.

Isaac N. Cook for appellant. Section 2 of chapter 728 of the Laws of 1867 did not repeal the preference declared in 2 R. S. 74, chap. 6, title 2, art. 2, § 28. (Code of Civil

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Procedure, §§ 2660, 2662; *Cobb v. Beardsley*, 37 Barb. 192; 2 Bliss' Code, 647; 2 Black. Com. 496, 504, 505; 2 Kent's Com. 411, 412, 414 [12th ed.]; *Tonnele v. Hall*, 4 N. Y. 144; 1 Black. Com. 59; *Barnes v. Underwood*, 47 N. Y. 359; *Van Rensselaer v. Snyder*, 9 Barb. 302; *Brown v. Lease*, 5 Hill, 221; *McCarte v. Orphan Asylum Soc.*, 9 Cow. 437-506; *Williams v. Porter*, 2 Barb. 320; Dwarris, 672, 676 b.) A construction which repeals another statute should be very clear, and especially is this true when the repeal is a part of a statute and it seriously mars the harmony of a system. (*Hayes v. Symonds*, 9 Barb. 260; *People, ex rel. Kingsland, v. Palmer*, 52 N. Y. 83; *Smith v. People*, 47 id. 330; *Mongron v. People*, 55 id. 613; *Powers v. Shepard*, 48 id. 541; *Davis v. Fairbairn*, 3 How. [U. S.] 636; *Wallace v. Bassett*, 41 Barb. 92; *Mayor of New York v. Walker*, 4 E. D. Smith, 258; Potter's Dwarris, 154, 155, 157, n.; 1 Kent, 521, 523, 524; *Cobb v. Beardsley*, 37 Barb. 192; Code of Civil Procedure, §§ 2660, 2662.) The discretion of electing to appoint as administrator one or more of those equally entitled belongs to the surrogate, and it is his prerogative. (3 Blackstone, 496, 504, 505; 2 Kent, 411, 412, 414; 1 Barb. Ch. Pr. 45; 2 Caine's Cases, 143; 2 Brad. 207; Code of Civil Procedure, § 2666; *Tilton v. Beecher*, 59 N. Y. 176.)

Odle Close for respondent. An unmarried woman has no prior right over a married woman to letters of administration on the property of a deceased person where both are of the same degree of kindred. (2 R. S., chap. 4, part 2, § 27, tit. 2; id., chap. 6, part 2, title 2, § 32; Laws of 1867, chap. 782, § 2; *West v. Mapes*, 4 Redf. 496; Redfield on Law and Practice of Surrogate's Court, 299.)

FINCH, J. The surrogate issued letters of administration to one of two sisters, who was unmarried, without notice to the other, who was a married woman. If the two had in all respects an exactly equal right, notice to one was an essential requisite to a valid appointment of the other. (Code, § 2662.)

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But if the provision of the Revised Statutes establishing preferences among those of equal degree of kindred to the intestate, as males to females, relatives of the whole blood to those of the half blood, and unmarried to married woman (2 R. S., title 2, part 2, chap. 6, § 28), remains unrepealed and in force, the appointment was valid, and notice to the married sister unnecessary. So much of the provision referred to as gives a preference to the *feme sole* is claimed to have been repealed by the act of 1867 relating to the authority and jurisdiction of surrogates. (Chap. 782.) The second section provides that a married woman shall be "capable" of acting as administratrix and "receiving" letters as such as though she was unmarried, and that her bond given on such appointment shall be valid and effectual. There is in this act no express repeal of the previously existing preference, and if it is so repealed at all it is by implication. That is the conclusion of the General Term in this case, and supported by the similar ruling of the surrogate of New York. (*West v. Mapes*, 4 Redf. 496.) But a repeal by implication must rest upon very clear and definite reasons. (*People, ex rel. Kingsland, v. Palmer*, 52 N. Y. 83; *Mongeon v. People*, 55 id. 613.) It must be the necessary solution of an inconsistency not otherwise to be solved. If the two statutes, on any reasonable construction, can stand together, and if the later enactment has scope to operate, and an apparent purpose of its own, without working a repeal of the earlier provision, both must be upheld and harmonized. The law of 1867 had such scope and purpose. Under the Revised Statutes the married woman could not be administratrix. She was classed among the incapables. (2 R. S., 75, § 32.) And where her relationship to the intestate would otherwise have given her the right, it went to her husband. Undoubtedly this was one of the results flowing from the theory which merged her existence in his, and narrowed or denied her separate rights. The later legislation which gradually invested her with the control of her own property, and recognized her independent existence, left no reason for retaining in the law her incapacity to act as administratrix. The old theory loosened its hold

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slowly. The act of 1863 took the next step. (Chap. 862, § 4.) It made her capable of such appointment "with the written consent of her husband." So that when the act of 1867 was passed it found two disabilities remaining and two difficulties needing to be removed. Accordingly, it enabled the married woman to act as administratrix as if she was unmarried, thus dispensing with the condition of her husband's consent, and made her bond valid and effectual. The act, therefore, had scope for its operation, and purposes to accomplish without touching the existing preference. We are not compelled to refer it to that for lack of other subject on which it could operate. Nor is it necessarily inconsistent with such preference. It is an enabling act. It deals with the capacity of the married woman to act as administratrix and receive letters as such. It frees her from disabilities, and its language is satisfied and its apparent aim reached without disturbing the statutory order of appointment. The two enactments can stand together and are not necessarily inconsistent. The married woman is freed from every disability affecting her capacity to act as administratrix. She is made just as capable of so doing, even to the giving of bonds, as her unmarried sister, but when choice is to be made between the two the preference is with the latter. That preference does not affect or modify the equal capacity of the married woman to act as administratrix and to receive letters. It creates and assumes such equality, but chooses between the two as equally capable, and of equal degree of kindred, giving a preference of appointment to the unmarried woman. It is not difficult to discover reasons for the choice. The possible influence of the husband over the wife in respect to the administration, and his interference through that influence, would be apt occasionally to provoke difficulty and hostility on the part of the actual relatives, viewing his suggestions or demands as the meddling of a stranger in blood; and his own action would not always be moulded and shaped in accordance with that natural affection and confidence which usually exists between those of the same blood. The change in the rights and capacity of the wife

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removed many of the reasons for the preference of the statute but did not destroy them all. It is, therefore, a significant fact that the act of 1867 contained no express repeal of such preference. It professedly dealt with the relations and capacity of the married woman in a case of intestacy. The general subject was under consideration. Provisions of the Revised Statutes relating to it were some amended and some repealed. That under the circumstances of such legislation the statute giving the preference was not directly repealed indicates that it was not intended to be. We think the two enactments are not so necessarily inconsistent or repugnant as to warrant us in declaring a repeal by implication.

The order of the General Term should be reversed and those of the surrogate affirmed, with costs.

All concur, except TRAOR, J., absent.

Ordered accordingly.

THE PHOENIX BANK, Respondent, v. DANIEL P. STAFFORD et al., Appellants.

In an action by a firm creditor to reach lands purchased and paid for by S., a member of the firm, but conveyed to his wife with intent, as alleged, to defraud creditors, it appeared that such conveyance was made about four years prior to the contracting of the debt to plaintiff; that after payment for the lands, the price of which was \$10,000, S. had several thousand dollars' worth of individual property, and, so far as appeared, owed no individual debts; that the firm was entirely solvent and was doing a prosperous business. *Held*, that the evidence justified a finding that there was no fraud, and an affirmance of the validity of the conveyance.

(Argued May 31, 1882; decided June 13, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made October 5, 1880, which reversed, on questions of fact, a judgment in favor of defendant, entered upon the report of a referee.

This action was brought by plaintiff to subject certain lands alleged to have been bought and paid for by Daniel P. Stafford,

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but conveyed to his wife, the other defendant, in fraud of his creditors, to the payment of two judgments recovered by plaintiff on partnership obligations against the members of the firm of Stafford & Ellis.

That firm failed in December, 1874, and made a general assignment for the benefit of creditors.

The further material facts are stated in the opinion.

S. N. Dada for appellants. The husband is authorized to make a settlement of a suitable amount from his property upon his wife, if he has no dishonest purpose in view, and such settlement the law will protect. (*Hunt v. Johnson*, 44 N. Y. 27; *Carr v. Breese*, 81 id. 584.) The question of fraud is one of fact, often depending on conflicting evidence, on inferences to be drawn from surrounding circumstances. (12 Weekly Dig. 396.) The indebtedness sought to be declared a lien upon the real estate conveyed to the wife accrued so long a time after the conveyance to her that the presumption is in favor of the good faith of the transaction. The burden of proof is on the plaintiff and he must establish the fraudulent intent in the most satisfactory manner, and with reasonable certainty. (12 Weekly Dig. 570; 81 N. Y. 584.)

C. W. Avery for respondent. A fraudulent intent makes the conveyance void both as to existing and subsequent creditors of the firm. (*King v. Savage*, 11 Paige, 589; *Patridge v. Stokes*, 66 Barb. 586; 39 id. 164; *Carr v. Breese*, 18 Hun, 134.) The true rule as to fraudulency or fairness of a voluntary conveyance is founded on the pecuniary ability of the donor at the time of the gift to withdraw the amount of his donation from his estate without the least hazard to his creditors, or in any material degree lessening their prospect of prompt payment. (Bump on Fraudulent Conveyances, 291; *Carpenter v. Roe*, 10 N. Y. 227; *Babcock v. Eckler*, 24 id. 623; *Cole v. Tyler*, 65 id. 73-77.) Subsequent insolvency before payment of debt is some evidence of insolvency when gift was made. (Bump on Fraudulent Conveyances, 294, 296, 299; *Savage v. Murphy*, 34 N. Y. 508; 18 Wend. 375-379;

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39 N. Y. 170 ; 1 Hoff, Respts, 78-85-86 ; 12 Barb. 653-656 ; *Shand v. Hanley*, 71 N. Y. 319.)

PER CURIAM. The debts upon which the plaintiff's judgments were rendered were contracted in 1874. The conveyance to the wife of Stafford, one of the judgment debtors,* was made September 21, 1870, and recorded November 21, 1870. The burden was upon the plaintiff to establish that this conveyance was procured to be made by the defendant, Daniel P. Stafford, to his wife, with intent to defraud his creditors. We think this intent is not satisfactorily established by the evidence. It is conceded that the husband paid the consideration of the conveyance. The purchase-price of the farm was \$10,000. It does not appear that the husband owed any individual debts when the conveyance was made. He paid in property and securities, \$8,000 at the time, and nearly the whole of the balance of the purchase-price within two years thereafter. It appears without contradiction that after paying the \$8,000, he had other individual property worth several thousand dollars.

In December, 1874, when the firm of Stafford & Ellis failed, Stafford's individual debts amounted to \$1,407.55. It does not appear when they were contracted. Only a few hundred dollars was realized by the assignee from Stafford's individual assets. How they had become reduced from 1870 to 1875 is not explained. It is clear from the evidence that the conveyance to Mrs. Stafford did not violate the rights of any individual creditors of her husband. This indeed is not claimed. The material point is, whether it was a fraud upon the copartnership creditors of Stafford & Ellis. It would materially aid in determining this question, if the financial condition of the firm in September, 1870, when the conveyance was made, could be definitely ascertained. In March, 1869, the nominal assets of the firm, as appears from an invoice of that date, were \$13,227.54, and the liabilities, \$7,751.02. The assets consisted of merchandise, notes, accounts, etc., and the liabilities included an indebtedness of the firm to Stafford of \$3,500, for goods turned over by him to the firm upon its organization in 1861. No invoice is shown for 1870. In March, 1871, the assets were

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inventoried at \$13,980.99, and in March, 1872, \$14,970.51. It does not distinctly appear what the liabilities were in 1872, but it may be inferred from the evidence that (including the debt to Stafford) they were between \$6,000 or \$7,000.

It seems to be quite plain that the nominal assets in 1870 largely exceeded the firm liabilities. Although no invoice for that year is shown, it may be inferred from the evidence that the assets and liabilities in that year substantially corresponded with those of 1869 and 1872. It was, therefore, quite material for the plaintiff to establish that the nominal value of the assets was not the real value, and that the excess of assets over liabilities was apparent only. The plaintiff gave proof tending to show that debts included among the assets of 1869 were either uncollectible, or had been paid, or were subject to offset, and that the goods were inventoried beyond their value. But we think that the plaintiff failed to impeach the correctness of the invoices to such an extent as to warrant the conclusion that the firm was not solvent when the conveyance to Mrs. Stafford was made, or to show facts justifying the inference that in making the conveyance, Stafford intended to defraud the firm creditors. It was affirmatively shown that the firm business was prosperous until 1873, and that it was seriously affected by the financial crisis of that and the succeeding year. The evidence of the witness Sweet, of alleged declarations of Stafford made in 1870, if credited, tended strongly to establish a fraudulent intent in respect to the conveyance to Mrs. Stafford. But his evidence was substantially contradicted by Stafford, and his relations with the latter had for several years been unfriendly. The referee was best able to judge of the credibility of the witnesses.

It would not be useful to state in further detail the facts bearing upon the issue of fraud. We think the conclusion of the referee, affirming the validity of the conveyance, is, on the whole, just, and warranted by the evidence.

The order of the General Term should be reversed, and the judgment of the referee affirmed, with costs.

All concur, except TRACY, J., absent.

Judgment accordingly.

THE NASSAU GAS-LIGHT COMPANY, Appellant, v. THE CITY OF
BROOKLYN et al., Respondents.

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| 129 | 551 |

The provision of the act of 1880 providing "for raising taxes for the use of the State upon certain corporations," etc. (§ 3, chap. 542, Laws of 1880) which excepts from the operation of the act "manufacturing corporations carrying on manufacture within this State," is not limited to corporations organized under the General Manufacturing Act, but includes all corporations, under whatever law incorporated, whose chief and principal business is the manufacture and sale of artificial products.

A corporation organized under the act authorizing the formation of gas-light companies (Chap. 37, Laws of 1848), and which is engaged in manufacturing and supplying illuminating gas, is a manufacturing corporation within the meaning of said provision.

Accordingly *held*, that the provision of said act (§ 8), which exempts from other taxation all corporations liable to be taxed under the act did not apply to a gas-light company.

(Argued June 1, 1882; decided June 13, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 12, 1881, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Mem. decision below, 25 Hun, 567.)

This action was brought to restrain the collection of a tax assessed by the board of assessors of the city of Brooklyn upon the capital stock and personal property of the plaintiff.

The material facts are stated in the opinion.

Winchester Britton for appellant. Statutes should be interpreted according to the most natural and obvious import of their language without resorting to subtle or forced construction for the purpose either of limiting or extending their operation. Courts cannot correct supposed errors or omissions of the legislature. (*Waller v. Harris*, 20 Wend. 561; *McCloskey v. Cromwell*, 11 N. Y. 601; *Beebe v. Griffin*, 14 id. 244; *Jackson v. Lewis*, 17 Johns. 475; *People v. R. R. Co.*, 13 N. Y. 78.)

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John A. Taylor for respondents. The appellant is still subject to taxation for city and county purposes, notwithstanding the exemption contained in the eighth section of chapter 542 of Laws of 1880. (*People, ex rel. The Westchester F. Ins. Co., v. Davenport*, 25 Hun, 630.)

FINCH, J. We are asked to say that the Nassau Gas-light Company is not a manufacturing corporation within the meaning of the exception contained in section 3 of chapter 542 of the Laws of 1880. The company was incorporated under the act of 1848, chapter 37, entitled "An act to authorize the formation of gas-light companies." By its certificate, filed in accordance with the provisions of that act, it states the purpose and object of its organization to be that "of manufacturing and supplying gas," etc.; and as matter of fact, it is found that ever since its organization it has been engaged in such manufacture and supply. Its own declaration, and the fact established and found, show it to be a manufacturing corporation.

It is said, however, that the corporations excepted under that designation in the act of 1880 are only those formed under the General Manufacturing Act of 1848. But there is no reference to the latter act. It is not mentioned or described. The corporations excepted are accurately designated apart from any such reference, and its consequent limitation. And we are reminded that corporations organized in other States, those formed under the original act of 1811, and under the later enactment relating to business corporations, although engaged in manufactures, and within the evident definition of the act of 1880, so far as its exceptions are concerned, would be excluded from such exceptions if the appellant's construction should be adopted. We can see no just reason for interpreting the words "manufacturing corporations" in any other than their usual and ordinary sense, and as relating to all companies, under whatever law incorporated, and by whatever general name, whose chief and principal business is the manufacture and sale of artificial products.

But it is said again that illuminating gas is not such artifi-

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cial product, but a bounty of nature, imprisoned in coal, and needing only to be set free; and we are asked to take judicial notice of that fact. It has not been proved; it is contradicted by the admission of the plaintiff's certificate describing the character of its business; and also by the express finding of the trial court. To invoke judicial notice against proven facts would make the judge independent of the evidence. But if our general knowledge, not perhaps precisely accurate or scientific, could be properly brought into the discussion, it would harmonize with the facts established without it. Such common understanding is, that the illuminating gas furnished to our streets and dwellings, as furnished and used, is not a mere natural product, but an artificial combination and modification of several. The process is aptly described as a destructive distillation of coal. The illuminating gas of the richer cannel or caking coals, by itself unfit for use because of imperfect combustion, is ordinarily mingled in definite and ascertained proportions with an excess of non-illuminating gas obtained from poorer coals, or other sources of supply, which serves to dilute and thus utilize and carry the light-giving gas. So that the resultant compound differs widely from each of its constituent elements, but even yet needs to be further modified and changed before it is fit for use. Condensation and washing rid it of certain impurities; a chemical process frees it from others; it is finally stored in a holder of ingenious construction; transported through pipes having peculiar appliances; and measured out to the consumer through a meter which is the result of considerable inventive skill, but whose accuracy is not always cheerfully admitted. One at all familiar with the ordinary process which ends in the illuminating gas adapted to our use, and with the mechanical devices and operating skill necessary to attain the desired result, cannot be easily convinced that the business of producing it is not properly and accurately described as a manufacture, and the corporation engaged in it as a "manufacturing corporation."

We are clearly of opinion, therefore, that the plaintiff was

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within the exception of the act of 1880, and as a consequence properly assessed under the prior statutes.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., absent.

Judgment affirmed.

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THE FIRST NATIONAL BANK OF MEADVILLE, PENNSYLVANIA,
Respondent, v. THE FOURTH NATIONAL BANK OF THE CITY OF
NEW YORK, Appellant.

Defendant having received from plaintiff for collection, a draft drawn by a Pennsylvania bank, on C., P. & Co., bankers in N. Y., delivered the draft to the drawees on receipt of their check for the amount; this was not presented for payment until the next day, when payment was refused, C., P. & Co. having failed on that day. Defendant thereupon returned the check to C., P. & Co., and received back the draft, demanded payment, caused the same to be protested for non-payment and the next day served notice of protest upon the drawer. In an action to recover damages for alleged negligence, it was *held*, that defendant was liable, but that as the remedy against the drawer was preserved, defendant was only liable for the actual damages. (77 N. Y. 320.)

On a second trial for the purpose of showing damage to the full amount of the draft, plaintiff offered in evidence a judgment record in an action brought by it in a Pennsylvania court against the drawer, whereby it was adjudged that the acceptance of the check and omission to make due presentment constituted as between the drawer, the payee and defendant a payment and discharged the drawer's liability. *Held*, that the record was competent evidence and conclusively established plaintiff's damages to be the full amount of the draft.

Also *held*, that it was not incumbent upon plaintiff as a condition of recovery to tender the draft to defendant.

The new trial was had after the going into effect of the Laws of 1879 (Chap. 538), fixing the rate of interest at six per cent. *Held*, that plaintiff was only entitled to interest at that rate for the whole period after the cause of action accrued.

The First Nat. Bank v. The Fourth Nat. Bank (24 Hun 241), modified.

(Argued June 1, 1882 ; decided June 13, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order

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made March 17, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of the referee. (Reported below, 24 Hun, 241.)

This action was brought to recover damages resulting from alleged negligence on the part of defendant in performance of its duty as agent for plaintiff.

The case is reported on a former appeal in 77 N. Y. 320.

On March 22, 1866, the National Bank of Crawford county, Pa., made and delivered to plaintiff, a National bank, located at the same place, a sight draft for \$6,000, drawn upon Culver, Penn & Co., bankers in New York city; which draft plaintiff indorsed and mailed to defendant, its corresponding bank in said city, for collection. It was received by defendant on the morning of March 26, and was on that morning presented to the drawees for payment. Said drawees gave their check on a New York bank for the amount, and the draft was delivered to them. Defendant did not present the check for payment on that day; it was sent through the clearing-house and presented for payment the next day, but payment was refused, as Culver, Penn & Co. had failed on that day. Defendant thereupon returned the check, received back the draft, made formal demand of payment and caused the same to be protested for non-payment. On March 28, due notice of protest was served by mail upon plaintiff and upon the drawer.

The further material facts are stated in the opinion.

Wm. S. Opdyke for appellant. As the draft was payable at the city of New York the liability of the drawer is to be determined solely by the law of the State of New York. (*Hibernia Nat. Bk. v. Lacombe*, 84 N. Y. 367; *Everett v. Vendryes*, 19 id. 436; *Dickinson v. Edwards*, 77 id. 573; *Scudder v. Union Nat. Bk.*, 1 Otto, 406.) The law of Pennsylvania, in the absence of any evidence, is presumed to be the same as the law of this State. (1 Wharton on Evidence, § 34.) This presumption can be overthrown only by proof of the law of Pennsylvania, as a fact, by oral evidence or by the books of reports of cases adjudged in the courts of that State. (Greenleaf,

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§ 488; Code of Civil Proc., § 942.) The judgment-roll, if competent evidence for any purpose, is evidence only of the fact that such an action was brought and such a judgment rendered. For all other purposes it is *res inter alios acta*. (Greenleaf on Evidence, § 338.) A check received for the amount of a debt due is not payment unless subsequently honored. (*Smith v. Miller*, 52 N. Y. 173.) The courts judicially recognize the existence of the custom in the city of New York for banks to collect, through the clearing-house, all checks received by them under an arrangement by which the actual payment of such checks is not completed until the day subsequent to the receipt thereof. (*Agawam Bk. v. Strever*, 18 N. Y. 502; *Eaton & Co. v. Avery*, 83 id. 31; *Merch. Nat. Bk. of Whitehall v. Hall*, id. 333; 3 Encyclopædia Britannica [9th ed.], 328; 1 Johnson's Cyclopædia, 973; Homan's Bankers' Almanac, 1881, p. 284; 2 American Cyclopædia, 282; Report Contr. of the Currency, 1881, p. 24; *Turner v. Bk. of Fox Lake*, 4 Abb. Ct. App. Dec. 432; *Burkhalter v. Second Nat. Bk. of Erie*, 42 N. Y. 538; *Indig v. Nat. City Bk. of B'klyn*, 80 id. 100.) The plaintiff's delay in asserting its claim against the defendant, and its omission to tender the draft to the defendant, are fatal to its claim. (77 N. Y. 330.) This being an action against the defendant for its alleged negligence, interest is to be allowed upon recovery, if allowed at all, merely by way of additional damages. (*Brainerd v. Jones*, 18 N. Y. 35; *Hamilton v. Van Rensselaer*, 43 id. 246; *Cook v. Fowler*, L. R., 7 H. L. 27; *Holden v. Trust Co.*, 100 U. S. 72; *Union Institution v. City of Boston*, 129 Mass. 82; *Fake v. Eddy's Ex'rs*, 15 Wend. 76-80; 1 Sedgwick on Damages, marg. p. 233; *Stewart v. Ellice*, 2 Paige, 604; *Sup'rs of Onondaga v. Briggs*, 3 Denio, 173.) Under the circumstances the court will order final judgment. (*Edmondston v. Field*, 16 N. Y. 543, 545; *Jackson v. Andrews*, 59 id. 244, 249; *Baker v. Lever*, 5 Hun, 114; 67 N. Y. 304.) As the draft was payable in New York, the drawer's liability, wherever it might be sued, was governed by the laws of New York. (*Hibernia Nat. Bk. v. Lacombe*, 84 N. Y. 367; *Everett v. Vendryes*, 19 id. 436;

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Meadville Bk. v. Fourth Nat. Bk., 77 id. 320.) When a party's loss has been measured by the amount of a recovery against it, that judgment is then evidence only of the quantum of damage, and is not in itself evidence of the liability for such damage. (*Britton v. Nicholls*, 3 Morrison's Transcript, U. S. Sup. Ct. Dec. 693-703; *Green v. New River Co.*, 4 T. R. 589; *Pritchard v. Hitchcock*, 6 M. & G. 168; *Douglass v. Howland*, 24 Wend. 35, 53; *Thomas v. Hubbell*, 15 N. Y. 405; *Bridgeport Ins. Co. v. Wilson*, 34 id. 275; *Second Nat. Bk. v. Ocean Nat. Bk.*, 11 Blatchf. 362, 369; Wharton on Evidence [2d ed.], § 823; Freeman on Judgments, §§ 180, 417; Bigelow on Estoppel, 65, 75.)

Henry J. Scudder for respondent. If a local custom had been made out, the ignorance of its existence, on the plaintiff's part, would have freed him from its requirements. (*Wall v. Bailey*, 49 N. Y. 470.) The appellant having received the draft upon account of an indebtedness to it by the drawer, or in payment of such indebtedness, either *sub modo* or absolutely, and failing through the negligence of its agent to collect the draft when collection was easy and certain, cannot throw the loss, caused by its carelessness and occasioning the total loss of the fund upon which the draft was drawn through its fault, back upon the drawer. (*Bradford v. Fox*, 38 N. Y. 291.) It was the duty of the defendant to charge the drawer of the draft. (Story on Prom. Notes, § 339; Daniels on Nego. Instru., §§ 327, 328, 910, 1625; *Allen v. The Merch. Bank*, Court of Errors, 23 Wend. 238, 239; *Montgomery County Bk. v. Albany City Bk.*, 3 Seld. 459; *Com. Bk. of Penn. v. Union Bank of New York*, 11 N. Y. 203.) The judgment record was properly received in evidence. It was competent for the purpose of establishing the measure of damages, and the efforts of appellant to escape the loss it sustained through the negligence of respondent and the futility of these efforts. (*Green v. N. R. Co.*, 4 T. R., 589; *Pritchard v. Hitchcock*, 6 M. & G. 165.) The referee was right in computing the interest at seven per cent to January 1, 1880, and after that at

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six per cent. (*Asso. for Relief of Females v. Eagleson*, Sup. Ct., Sp. T., FREEDMAN, J., Daily Register, Nov. 13, 1880; *Wilson v. Cobb*, 31 N. J. Eq. 91; S. C., 9 Reporter, 123; Story on Conflict of Laws, § 311a, note 4, citing *Grant v. Healey*, 3 Sumn. 523.) The record, having been offered to show the damages, was competent. (Wharton, § 823; *Farmers & M. Bk. v. Erie R. R. Co.*, 72 N. Y. 188.)

ANDREWS, Ch. J. This court held on the former appeal (77 N. Y. 320) that the whole duty of the defendant to the plaintiff, was not discharged by the presentment, demand and protest of the draft, within such time as is required by the general rule of law, in order to preserve the liability of the drawer, but that having on March 26, 1866, taken the check of the drawees for the draft, it was bound to make immediate presentment, and having delayed the presentment until the 27th, whereby the collection of the check was prevented, in consequence of the failure of Culver, Penn & Co. on that day, the defendant was chargeable with negligence, and a right of action therefor accrued to the plaintiff.

But the court reversed the judgment rendered for the amount of the draft, on the ground that it did not appear that the plaintiff had sustained damages to that extent through the defendant's negligence. The complaint, in one aspect, proceeds on the theory that the drawers had not been legally charged by due presentment and protest, and it averred that if legally charged the draft could have been collected from the drawer. This court held the presentment and demand on the 27th, and the service of notice of protest on the 28th, was sufficient within the law merchant to charge the drawer, and that as it appeared that the remedy of the plaintiff against the drawer of the draft was preserved, and that the drawer was solvent, the plaintiff was only entitled to recover the actual damages sustained. The cause was, therefore, sent back for error in the rule of damages.

On the second trial, from the judgment on which, this appeal is taken, the plaintiff for the purpose of showing that it had

sustained damages from the defendant's negligence to the full amount of the draft, produced in evidence the record of a judgment rendered in the Court of Common Pleas of Crawford County, Pa., in an action by the present plaintiff against the National Bank of Crawford county, a Pennsylvania corporation, the drawer of the draft, whereby it was adjudged that the transaction of March 26, 1866, constituted, as between the defendant, the drawer, and the plaintiff, the payee, a payment of the bill, and judgment passed on that ground for the defendant. This judgment rendered by a court of competent jurisdiction in an action presenting all the material facts conclusively established, as between the parties thereto, that the receipt of the check of Culver, Penn & Co., and the omission to make due presentment thereof, discharged the drawer's liability on the draft. The record was, we think, competent evidence in this case upon the question of damages. It seems to us to be quite immaterial to inquire, whether the same judgment would have been rendered if the action had been brought in this State. The plaintiff was compelled to resort to the courts of Pennsylvania, to bring its action against the drawer. No fraud or collusion is shown. The defendant in this action, by its failure to discharge its duty as collecting agent of the plaintiff, made itself liable for the damages the plaintiff has sustained through such neglect of duty. The practical effect of the Pennsylvania judgment, is to deprive the plaintiff of any remedy against the Crawford County Bank. It does not lie with the defendant to say that if the question had been tested in another jurisdiction, the result would have been different. We think, therefore, that the plaintiff was entitled to recover, under the proof on the second trial, the full amount of the draft as damages for the defendant's negligence.

The referee found, upon sufficient evidence, that no uniform custom in regard to accepting checks from the drawees of sight bills in payment of drafts sent to collecting banks in the city of New York, was proved. The evidence shows that the practice varies with the credit of the drawee, the condition of the money market and other circumstances, and among different

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banks, and the plaintiff had no knowledge of any such custom or practice. So also as to the alleged custom of collecting checks through the clearing-house, by which they are not presented to the bank on which they are drawn until the next day after they are received. This practice prevailed only among banks making exchanges through the clearing-house. It did not prevail among other banks, or with savings banks, or trust companies, or with respect to checks on private bankers. The evidence failed to establish a certain, uniform or general custom, in respect either to accepting checks for drafts or collecting them through the clearing-house. It is unnecessary therefore to consider whether the alleged custom to receive uncertified checks in payment of bills, and to defer presentation until the next day after their receipt, if established, would regulate and define the rule of diligence, as between a collecting agent and his foreign principal. It was not, we think, incumbent upon the plaintiff to tender the draft to the defendant as a condition of recovery.

The judgment should therefore be affirmed with a modification in respect to the allowance of interest, which should be at the rate of six per cent for the whole period after the right of action accrued, according to the principle settled in *Salter v. Utica, etc., R. R. Co.* (86 N. Y. 401).

The judgment should be, therefore, affirmed as modified, but without costs of this appeal.

All concur.

Judgment accordingly.

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HENRY CLEWS et al., Respondents, v. BANK OF NEW YORK
NATIONAL BANKING ASSOCIATION, Appellant.

A bank by the certification of a check drawn upon it guaranties the genuineness of the signature of the drawer, represents that it has funds of the drawer in its hands sufficient to meet it, and engages that those funds shall not be withdrawn to the prejudice of any *bona fide* holder of the check. The certification does not import that the body of the check is

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genuine, or that the funds on deposit are absolutely applicable to the payment of the precise check certified.

A draft drawn upon defendant was indorsed by the payee, and mailed to the indorsee; it was presented to and certified by defendant; it was thereafter altered by raising the amount and changing the date, and the payee, and was offered to plaintiff in payment for certain bonds. Plaintiff sent it by a messenger to defendant's banking-house, who presented it during business hours to the paying teller with a request to know if the certification was good. The teller answered "yes," and thereupon plaintiff accepted the draft. Before this defendant had been notified that the draft had not reached the indorsee, and had been requested to stop payment. In an action to recover the amount of the raised draft, *held* (DANFORTH and TRACY, JJ., dissenting), that the defendant was not estopped by the statement of the teller from denying its liability; that at the time the draft was presented to its teller defendant owed the plaintiff no duty of active diligence to protect it from the fraud, but was bound only to act in good faith, and in the absence of evidence of bad faith or negligence, plaintiff could not enforce payment.

Clews v. Bank of N. Y. Banking Ass'n (8 Daly, 476), reversed.

(Argued April 26, 1882; decided June 20, 1882.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made November 8, 1880, which affirmed a judgment in favor of plaintiffs entered upon a verdict. (Reported below, 8 Daly, 476.)

On the 6th of January, 1879, the Commercial National Bank of Chicago drew its draft upon the defendant, payable to the order of Wirt Dexter, for \$254.50, and bearing this number: "No. 73,436." On the 8th day of January, 1879, the defendant was advised by the Commercial National Bank that this draft had been so drawn. On the 15th of January, 1879, it was presented to defendant's paying teller in New York, and was certified by him, and the name, number and amount entered in his certification-book. On the 10th day of February, 1879, the cashier of the Commercial National Bank wrote to the defendant's cashier, stating that said draft was indorsed over to Augusta H. D. Godman, and mailed to her from Chicago, but had not been received; and concluding: "Mr. Dexter now requests a duplicate, and you will please stop pay-

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ment on the original, which you say you have certified." This letter was received by defendant two or three days after its date, and an entry was made by the defendant's registrar in a book kept for such purposes, as follows: "Stop payment; see letter February 10, 1879." On the 3d day of March, 1879, a person, calling himself E. J. Murphy, purchased of the plaintiffs \$2,500 in government bonds, and tendered in payment therefor the draft above described, bearing its original number, 73,436, but otherwise altered so that it appeared to be dated February 27, 1879, and to be payable to the order of Henry Clews & Co., and to be drawn for \$2,540. Before accepting the draft plaintiffs sent it by their messenger to defendant's bank who testified that he presented it to the paying teller in business hours with the statement that "Henry Clews & Co. want to know if the certification is good;" the teller looked at it and answered "yes." The messenger, returned the draft to plaintiffs, informed them of the answer given to his inquiry and thereupon plaintiffs accepted the draft and delivered the bonds.

The court charged among other things in substance that, if the draft was presented to the teller and he answered the query as testified to by the messenger, that plaintiffs were entitled to recover. To this defendant's counsel duly excepted.

Wheeler H. Peckham for appellant. Assuming that this action is brought on the draft, plaintiffs must fail for want of title, irrespective of any question of liability of defendant. (*Mass v. R. R. Co.*, 11 Hun, 8; *Turnbull v. Rontey*, 2 Robt. 406; 40 N. Y. 456.) The statement of the teller, made after the alteration, that the certification was good, can have no other or greater effect than if the check had been then presented and certified. In such case the bank would not be liable. (*Park Bk. v. Ninth Bk.*, 46 N. Y. 77; *Marine Bk. v. City Bk.*, 59 id. 67; *Security Bk. v. Bk. Republic*, 67 id. 458.) The omission and neglect of the teller to inform the messenger of the countermanding of the original draft created no liability of defendant. (*Espy v. Bank*, 18 Wall. 604; 67 N. Y. 463.) Defendant was not liable *ex contractu*. (67 N. Y. 458.)

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Albert A. Abbott for respondents. The transactions between plaintiffs' messenger and the paying teller amounted to a certification by the defendant of the check as then presented. (*Cont'l Nat. Bk. v. Nat. Bk. of Comm.*, 50 N. Y. 575, 580, 581.) The certification of a check is equivalent, in the obligation incurred, to acceptance of a draft. (*Security Bk. v. Nat. Bk.*, 67 N. Y. 462; *Merchants' Bk. v. State Bk.*, 10 Wall. 604; *Marine Bk. v. Nat. City Bk.*, 59 N. Y. 67.) The certification of a check extends to all matters presumptively or actually within the knowledge of the certifying bank, and is an agreement by the bank that as to all such matters the check is good. (*Espy v. Bk. of Cincinnati*, 18 Wall. 604, 619; *Security Bk. v. Nat. Bk.*, 67 N. Y. 458; *Nat. Park Bk. v. Ninth Nat. Bk.*, 46 id. 77; *Marine Nat. Bk. v. Nat. City Bk.* 59 id. 67.) Defendant is estopped from disputing its liability on the check. (*Cont'l Bk. v. Bk. of Comm.*, 50 N. Y. 575; *Preston v. Mann*, 25 Conn. 117; *Man. & Traders' Bk. v. Hazzard*, 30 N. Y. 230; *Blair v. Wait*, 69 id. 113; *Armour v. M. C. R. R. Co.*, 65 id. 116; *Brooks v. Martin*, 43 Ala. 360.) The teller was the agent of the bank, for the purposes of the application made. (*Cont'l Nat. Bk. v. Nat. Bk. of Comm.*, 50 N. Y. 581.)

EARL, J. The plaintiffs did not obtain lawful title to this check and therefore cannot enforce payment of it against the defendant unless it is in some way estopped from denying its liability to pay.

When the defendant certified the check to be good, it assumed a liability like that of an acceptor of a draft. By the certification it guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer, to the prejudice of any *bona fide* holder of the check; and the certification did not impose upon the defendant any further or greater responsibility. It did not import that the body of the check was genuine or that the funds on deposit with it were

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absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank cannot be called upon in consequence of its certification to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake and subsequently pays the money thereon without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake. (*National Park Bank v. The Ninth National Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *The Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *Security Bank v. National Bank*, 67 N. Y. 458; 23 Am. Rep. 129; *Espy v. The Bank of Cincinnati*, 18 Wall. 604.) Precisely the same rule is applicable to the acceptor of a bill of exchange. By his acceptance he guarantees the genuineness of the drawer's signature, but not the genuineness of any other names upon the paper or of the body of the paper in respect to the date and the amount thereof. If any of the names upon the paper other than the drawer's have been forged, or if the body of it has been altered by increasing the amount thereof, and the acceptor, without culpable negligence, pays the bill by mistake, not knowing of the forgery and alteration, he may recover back the amount paid as money paid by mistake; and whether the forgery and alteration were made before or after acceptance can make no difference.

Here it is conceded that if this check had been raised before the certification the defendant would not have been bound to pay the same, and that if by mistake it had paid the same it could have recovered the money back. But it is claimed that because the alteration and raising of the check took place after the certification a different rule applies, and that the defendant upon the facts of this case was properly held liable.

It is true that defendant when called upon by the plaintiffs' agent before they took the check could have discovered the alteration; but was it bound to discover it and to inform the plaintiffs? The agent of the plaintiffs called upon the defend-

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ant during banking hours and presented this check to the paying teller and told him that the plaintiffs wanted to know if the certification was good, and he looked at it and said yes. At that time the bank owed the plaintiffs no duty of active diligence to protect them from the fraud which the holder of the check was trying to perpetrate upon them. It was bound to act in good faith and not to do any thing or say any thing intentionally or carelessly which would mislead them or upon which they could properly rely in taking the check. The inquiry was not whether the body of the check was good or whether that check was certified and was then in the same condition in which it was at the time of the certification; nor was the inquiry whether the check was good for the amount thereof or whether the amount thereof would be paid. The attention of the teller was called to nothing but the certification. It was presented to him while he was very actively engaged in the ordinary business of the bank, paying and certifying checks. There was nothing calling his attention to the number of the check or the amount thereof, and there was nothing requiring that he should stop his business at that time and look at the records of the bank to see whether the check was then in the same condition it was in at the time of its certification. The simple inquiry was, whether the certification was good, and it went no further. Suppose the check had never been certified and the inquiry had then been whether the check was good and the teller had replied that it was, such an answer would in law only have implied that the name of the drawer was genuine, and that there were funds in the bank to meet the check; and the bank would not have been responsible for any alteration or forgery of the body of the check, and upon this point there is quite direct authority. In *Marine Bank v. National City Bank* (*supra*), which was an action to recover back money paid upon a check which was certified after it had been raised, it was held that the certificate in such a case means simply that the drawer's signature is genuine; that he has funds in the bank sufficient to meet the check, and that the bank engages that those funds will not be withdrawn from the bank by the drawer; and

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ALLEN, J., writing the opinion, said: "Hence in all reason as well as legally the inquiring of a drawee in respect to a check and the response whether verbally or in writing that it is good must be held, in the absence of circumstances indicating a wider reach of inquiry, and a broader answer, to relate to those facts and those only of which the drawee is presumed to have knowledge, viz.: the two facts before mentioned." In *Espy v. The Bank of Cincinnati*, which was a similar action, the facts were that a check was drawn by "S. and M." on the bank for \$2,650, in favor of "H.," and was raised to \$3,920, and the payee's name changed from "H.," to "E. H. & Co.," and was offered to the latter by a stranger in payment for bonds and gold purchased by him. "E. H. & Co." sent the check for information to the bank, whose teller replied "It is good," or "It is all right;" and it was held among other things "that when a party to whom such a check is offered sends it to the bank on which it is drawn for information the law presumes the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points, and unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters his response that the check is good will be limited to them and will not extend to the genuineness of the filling in of the check as to payee or amount." Here the inquiry pointed to nothing but the certification. The attention of the teller was called to nothing else, and his response when he said that it was good had reference only to the certification, and imposed no broader or greater liability upon the bank than if the check had then first been presented for certification. In *Security Bank v. National Bank* (67 N. Y. 458) which was an action to recover the amount paid upon a raised check, it was held that the plaintiff was not estopped from alleging the forgery by the fact that its teller, at the time the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was all right in every particular, and that it was no part of the teller's duty to give an assurance as to the genuineness of the check

except in respect to the signature of the drawer, and that beyond that the bank was not bound by his representations. ANDREWS, J., writing the opinion, said: "If the reply made to the question put to him was intended as an affirmation of the genuineness of the body of the check it was simply an expression of his opinion and must have been so understood by the person who made the inquiry." The inference here is as strong as in any of the cases cited that the inquiry related only to the genuineness of the certification, because the inquirer had no knowledge whatever of any of the facts that had previously transpired in reference to the check, or that any facts were in the possession of the bank not ordinarily possessed in reference to checks certified by it. It was the ordinary inquiry whether a check was good or whether the certification was good, and the reply was the ordinary reply that it was good, and imposed upon the bank the liability which such a reply under ordinary circumstances imposes. The bank was not called upon for any of the facts in its possession in reference to this draft. But if the inquiry had been broader the bank might have been bound in good faith to have disclosed the facts and might have been chargeable with bad faith or negligence in not disclosing them, and thus made liable upon this check. But here there was no question of bad faith or negligence submitted to the jury, and they were charged that if the check was presented to the paying teller with the inquiry alleged, and he replied that it was good, the bank thereby became absolutely bound to pay the same to the plaintiffs.

If the check had been presented for payment then undoubtedly a different question would have been placed before the paying teller for his consideration. It would then have been his duty to take notice of the facts in the possession of the bank, and payment under such circumstances would have been such a careless act that it would be held that the bank could not recover back the money.

When the paying teller said that the certification was good that declaration did not import that there was the amount of money named in the check in the bank absolutely applicable to the payment of the check, in any other sense than if the

certification had been made after the check had been raised. The certification of a check never imports that there is money in the bank absolutely applicable to the payment of the amount named in the check. On that point it simply imports that the drawer has money to the amount of the check which will not be withdrawn, and which will be paid upon the check if it is properly payable thereon; that is, by the certification the drawee bank becomes responsible to pay the holder whatever is properly due upon the check, and nothing more. The same principle would have to be applied if the defendant had been an individual acceptor of a draft. Then the inquiry would have been, whether the acceptance was genuine or good, and the answer that it was good would not have imported that the draft was good for the amount for which it then appeared to have been drawn. If the acceptor in such a case actually knows that the draft has been raised, and is thus not good for its face, he would be bound, acting in good faith, to disclose that fact. But if at the time he did not know it, and was not aware of any defect in or defense to the draft, his reply that his acceptance was good would not of itself estop him, when called upon for payment, from asserting that the draft had been raised or otherwise altered after his acceptance. He might be engaged in accepting so many drafts, or be so situated or engaged at the time that such an inquiry calling attention to nothing but his signature would not bring to his notice the fact that the draft was not then in the same condition as when his acceptance was written. When such an inquiry is made of an acceptor, all that can be required of him is that he shall answer in good faith. If the holder desires more accurate information his inquiry should be more specific and far-reaching before he can transfer a loss caused to him by the fraud of the person with whom he deals to the innocent acceptor.

Here the teller of the bank made no mistake; he answered truly the question put to him. He did not mislead the plaintiffs. They relied upon the certification, which was genuine, and under such circumstances there can be no reason for giving them a remedy against the defendant. They dealt with the

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forger, and suffered wrong from him, and there can be no rules of law or justice which should, upon any facts now appearing, visit the consequences of this wrong upon the defendant.

Our conclusion is, therefore, that the judgment should be reversed and a new trial granted, costs to abide events.

DANFORTH, J. (dissenting). The plaintiffs are brokers, the defendant is a banking corporation, both doing business in the city of New York. The Commercial National Bank of Chicago drew its check, numbered 73,436, upon the defendant for \$254.50, dated January 6, 1879, payable to Wirt Dexter, or order, and by letter advised the defendant thereof. The latter bank entered it in a book kept by its "registrar" for that purpose. On the 15th day of January some unknown person presented the check at the defendant's banking-house, and asked its teller to certify it. He inquired of the "registrar" whether the bank had been advised of the check, and thereupon certified it in the usual manner, and entered it, the name of the drawer, the number and amount of the check so certified, in his official book, and charged up the amount to the account of the drawer.

On the 5th of February the drawer asked to have the check returned, that it might "examine the indorsement." It of course could not be sent, for the defendant did not have it, and on the 10th of February the drawer notified the defendant that the check had not reached the person for whom it was intended; that the payee "Dexter" desired a duplicate, and requested the defendant to "stop payment on the original." It then entered in the "registrar's" book, opposite the former entry of the check, "stop payment, see letter February 10, '79," and on the 12th of February asked, through its correspondent, that "Mr. Dexter, or the owner," furnish "a bond of indemnity, and receive pay for the original." The bond was furnished on the 18th of the same month, and therewith the Chicago bank requested the defendant to credit its "account with the amount of the certified check." The check was afterward, and on the 2d of March, offered to the plaint-

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iffs at their office in payment for government bonds, which the holder professed a desire to buy. It had then been altered so as to bear date February 27, instead of January 6, read payable to the order of Henry Clews & Co., instead of Wirt Dexter, and called for \$2,540, instead of \$254.50.

The plaintiffs, before concluding a bargain, sent their messenger with the check to the defendant to inquire concerning it. The teller to whom it was presented took it in his hands, and the messenger then said to him, "Henry Clews & Co. want to know if the certification is good." The teller made such examination of the paper as he chose; the witness says "he ran his fingers over where the figures were, turned it over, threw it down, and said, 'yes.' " The messenger returned the check with this answer to the plaintiffs, and they, relying upon it, took it from the holder in payment for \$2,500 in government bonds, and gave him the balance, \$33.75, in cash. It was then sent through the clearing-house for collection in the usual manner, and on presentation to the defendant payment was refused. Upon these facts the plaintiffs have had judgment, and whether they can retain it or not is the question before us.

It is well settled, *first*, that by certifying in the usual manner a negotiable check, a bank assumes toward the holder of it the relation and liability of an acceptor of a draft. (*Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125; *Security Bank v. National Bank*, 67 id. 458; 23 Am. Rep. 129; *Marine National Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305.) It thereby, as has been said, affirms the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that they will not be withdrawn to the prejudice of the holder of the check (*Security Bank v. National Bank*, *supra*; *Marine National Bank v. National City Bank*, *supra*); or as put by SELDEN, J., in 16 N. Y. 130, the act of certification is "answering the supposed inquiry of one about to take the check whether the bank has funds of the drawer to meet it;" and by making it, the bank becomes principal debtor. (*Meads v. Merchants' Bank*, 25 N. Y. 147.)

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Second. The teller is in general the officer who by appointment or usage makes such certificate, and the bank is bound thereby to any person who does in good faith part with value upon the credit of the representation implied in it, whether it is true or false. (*F. & M. Bank v. B. & D. Bank*, 4 Duer, 219; affirmed, 16 N. Y., *supra*; *Irving Bank v. Wetherald, etc.*, 36 id. 335; *Pope v. Bank of Albion*, 59 Barb. 226; *Morse v. Mass. Nat'l Bank*, 1 Holmes, 209; *Willeys v. Phoenix Bank*, 2 Duer, 121; *Grant v. Norway*, 10 C. B. 665; *Meads, etc., v. Merchants' Bank of Albany*, 25 N. Y. 143.) And in this case it appears conclusively that the teller was the proper officer to represent the bank in such a transaction.

Third. But the certificate does not imply an engagement or warranty of the genuineness of the body of the check; if therefore there has been any fraudulent alteration prior to certification, it will not be binding, and payment in pursuance of it before discovering the mistake may be recovered back. (*Marine Nat. Bank v. Nat. City Bank, supra*; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *Security Bank v. Nat. Bank of the Republic*, 67 N. Y. 458.)

The effect of these propositions is to make the bank liable for the act of the teller while engaged in the business of his employment, and the plaintiffs' case is sustained by the principle upon which they rest. The plaintiffs can indeed claim nothing under the simple certification of the check, for they have never become its lawful owner. It was not indorsed by the payee. And although the paper transferred to them had upon it the formal certificate of the bank, it was nevertheless a forged instrument by reason of the several alterations, and therefore invalid. But while in this condition it was, as we have seen, presented to the teller, and by him declared "good." The plaintiffs had a right to understand from this that the check bore the genuine signature of the drawer, that it had already been presented to the bank, and being satisfied that the funds of the drawer were sufficient to meet the sum called for, it had so certified, and furthermore that the certificate then written upon the paper was the

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genuine certificate of the bank; and that the funds of the drawer in possession of the defendant were applicable to its payment. The teller has power to give such assurance. Certifying a check, and declaring a certificate already made to be "good," were acts of the same nature made in the exercise of the same authority. The object of the plaintiffs' inquiry was to ascertain the genuineness of the certificate, and the answer of the teller should charge the bank with the same obligation which would bind a natural person, if, in response to the inquiry, he had made the same reply. That obligation would require him to pay the acceptance notwithstanding the alteration.

The question was not "is that your signature," but is the "certification good." As to an individual, the question would have been "is the acceptance yours," or "is it good." And in either case the inquiry goes beyond the handwriting. It relates to the obligation of one who appears liable, and to the sufficiency of means for payment. "I warrant this note good," is a guaranty of its collectibility. (*Curtis v. Smallman*, 14 Wend. 231); so the words "Sold A. B. this note, and agree that it is good." (*Cooke v. Nathan*, 16 Barb. 342); also "I guaranty this note good." (*Sanford v. Allen*, 1 Cush. 473). If an individual had to answer the plaintiff upon this question, no ingenuity could work out a reason why he should not be held. If A., being asked to buy a note purporting to be made by B., should first ask him is this your note? and he should answer as the teller did "Yes," then whether forged in the signature or body of it would make no difference. B. would be required to pay the note. So if B. was the apparent acceptor of the check. The position of the bank is not different. The plaintiffs took the check upon its assurance that the certification was "good," and innocently parted with property to its full amount. If in view of that fact the plaintiffs cannot recover, it must be owing to some technical rule of law which overrides substantial justice and compels the court to shut its eyes and give its judgment against the common sense of the case.

Upon what does the defendant rely? That "the draft was stolen, altered and forged, and then sold to the plaintiffs." It

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is evident that these things are true. But the plaintiffs did not rely on the title thus acquired from the vendor, nor upon the representation made by the face of the draft; they sent to the defendant for information and relied on the answer given by it. "The check was altered after certification;" this also is true, but it was not altered after the defendant represented that the certification was "good." The defendant had knowledge of each one of these facts when the question was put to it, and is bound as to the plaintiffs as an individual would be to make its representation true. Nothing else is material.

In the *Irving Bank v. Weatherald* (*supra*), the plaintiff's teller had certified the note of one Wilson "good," and charged it to his account. It turned out that he had no funds in the bank, but the certifying bank paid the note, then protested it and afterward sued the indorsers and recovered. In discussing the transaction the court say when the note is presented the teller of the paying bank informs the presenter that the note is "good," in other words, continues the learned judge, informs him "that the maker has the funds in the bank to meet it." "This information," he adds, "may be communicated verbally, by letter, or by a memorandum on the note, ordinarily called a certificate." "The correctness of this certificate is a matter which the certifying bank has the means of knowing and is bound to state correctly."

In *Continental Bank v. National Bank of Commonwealth* (*supra*), we have a case which, in principle, is quite decisive of the question before us. The check of John Ross upon the plaintiff bank, when put in circulation, purported to be certified by the plaintiff's teller in the usual way. Ross offered it in payment for gold to one Cronise, a broker, and he sent it by his clerks to the plaintiff to see if it was "all right," in the mean time letting the gold go. The clerk put that question to the teller, and the reply was "yes." The broker was informed of this reply, and omitted, therefore, to make any effort to regain the gold, as he then might have done. He deposited the check in the defendant's bank. It was sent in through the clearing-house, and charged to the plaintiff in favor of the de-

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fendant the next day. It turned out that the certification was a forgery, and the plaintiff sued to recover back the amount of it. It was conceded that the defendant stood in the place of Cronise, and after judgment in its favor the plaintiff appealed to this court, where the judgment was affirmed, and the rule established that "where a forged certification of a check is presented to the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification and the bank is bound by it the same as if it was genuine." This is put upon the doctrine of estoppel, which prevents a party, by whose mistaken act or declaration another has been influenced, from setting up the truth in opposition thereto. It is discussed in that case at such length, with such variety of learning and such copious illustrations, by the late chief judge of this court, as to relieve us from further labor in regard to it, except to show its application to the case in hand.

This will be easy if we look at the substance of the transaction between the parties, the common and well-understood language used by the defendant and accepted by the plaintiff. But we are here met by the assertion of the learned counsel for the appellant, "that the statement of the teller, made after the alteration, that the certification was good, can have no other effect than if the check had been then presented and certified." It has already been conceded by the third proposition, above stated, that in such a case the bank would not be bound. The reason of that exemption is stated in the cases there cited.

In *The Marine National Bank v. The National City Bank* (59 N. Y. 67; 17 Am. Rep. 305), the plaintiff certified a check which had been altered, on the strength of which the defendant received it on deposit, and the plaintiff paid the amount to it. On discovering the forgery the plaintiff sued and recovered from the defendant. The recovery was upheld, the court saying the responsibility growing out of certification is limited to facts within the knowledge of the bank certifying, that is, "whether the drawers of the check have funds sufficient to meet it; and further, to obtain the engagement of the

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bank that those funds shall not be withdrawn from the bank by the drawers of the check," and no ground or reason was perceived "for extending the rule to matters not lying especially within the knowledge of the certifying bank."

Security Bank v. National Bank (*supra*) followed the preceding case in upholding the plaintiff's right to recover back moneys paid upon a check, the amount of which had been raised before certification, and holds that the declaration of the teller, made at the time of certifying, that the check "was correct in every particular," he then referring to the body of the check, and intending to be understood as saying that it was genuine, "was inadmissible to enlarge or vary the legal import of his act."

These cases are not to be questioned. They charged the bank with the consequences of facts within the knowledge of the teller, or which may be presumed to be within his knowledge. To that extent he represents the bank, and it is treated as an individual would be under similar circumstances. The plaintiffs may invoke the rule applied as far back as Mansfield's time, in *Price v. Neal* (3 Burr, 1355). It was then held that the drawee of a forged bill of exchange could not, after acceptance and payment, recover back from the indorsee the sum paid. It was then argued for the plaintiff that he paid the money by mistake, "on the supposition that they were genuine bills." On the other hand it was insisted that the payment was not by mistake, but rather owing to the negligence of the plaintiff, who should have inquired and satisfied himself whether the bill was really drawn upon him or not. Lord MANSFIELD said: "It was one of those cases which could never be made plainer by argument." That remark and the principle upon which the case was decided apply here. Indeed, if the defendant in the case before us had paid to the plaintiffs the amount of the check, and then sued to recover back the money, the two cases would have been on all fours.

The position of the defendant, when answering the inquiry addressed to its teller, is unlike the situation it occupied when it certified the check. Then it only knew the signature of the drawer, and the amount of the drawer's money in its hands.

Dissenting opinion, per DANFORTH, J.

Its certificate was by construction limited to those facts. Whether the body of the check was genuine or a forgery was a fact as well known to the check-holder as to the bank. But by certifying the check it substituted its own liability for that of the drawer. Indeed, the holder by taking the certificate released the drawer, for the check called for money, and the holder accepted a promise. When, therefore, a third party called upon the bank and asked whether the certification was good, another fact was called for also within the especial knowledge of the bank, and altogether unknown to the enquirer, whose ignorance indeed led to the question, viz.: whether the certification on the paper was that of the bank; not its signature merely, but whether it had certified to the truth of the facts then appearing on the paper: viz., the signature of the drawer, and that the drawer had in its, the bank's, custody the money called for by the face of the check, and that the money was applicable to its payment. In view of the then relation of the parties, this was the vital fact to know whether the defendant was in fact the acceptor, and had assumed the payment of that check, and was liable to respond to a demand for \$2,540. This is implied in the question, and so it must have been understood by the teller.

The check was negotiable. The defendant appeared upon it as "acceptor," or principal debtor. It was presented in the name of a firm of well-known brokers, with an inquiry indicating an interest which the teller alone could satisfy. He could not be ignorant that checks might be, and sometimes were, altered after certification. I have referred above to the means provided to guard the bank from error in its certificates. There is evidence from the teller showing that he had the means at hand for guarding against the very fraud which this case exhibits. If called upon to pay a certified check, he says he "never did so without referring to the book to see if it agrees with the amount it has been certified for." This was now the very question he undertook to answer. His book contained positive information, not only that the check did not agree with the certification, therefore that it was not good, but

Statement of case.

also it contained direction not to pay even the amount certified, and that the amount had already been paid back to the drawer. In these respects then he misinformed the plaintiff. The bank had not certified for the amount called for, and no funds were retained to meet the check. What the fact was, whether the certification was good, could only be ascertained by asking the teller. (16 N. Y. 125; *In re Land Credit Co.*, L. R., 4 Ch. App. 460.) It was not only his duty, therefore, to know these facts, he did know them, and acquired his information while exercising the ordinary powers and functions of his office. The act of communication with the plaintiff in regard thereto was an official act, also within the limit of the power delegated to him, and by its exercise the bank was bound. (*Fleckner v. Bank of U. S.*, 8 Wheat, 338; *E. R. Nat. Bank v. Gove*, 57 N. Y. 597; *Bank of Monroe v. Field*, 2 Hill, 445; *Farmers & Mechanics' Bank v. B. & D. Bank*, 14 N. Y. 623.) It was the declaration of the teller or his negligence which put the paper in circulation, and public policy, and a due regard to the integrity of commercial transactions, required that the defendant, whose officer he was, should redeem it.

The judgment should, therefore, be affirmed, with costs.

All concur for reversal, except DANFORTH and TRACY, JJ., dissenting.

Judgment reversed.

ELLEN MULOAHEY, Respondent, v. THE EMIGRANT INDUSTRIAL SAVINGS BANK, Appellant.

Plaintiff and her nephew O'K. opened a deposit account with defendant.

When the first deposit was made, plaintiff stated to defendant's officers, in the presence of O'K., that "either of them or both could draw the money." The usual savings bank pass-book was issued in which the deposit was entered to the credit of plaintiff "or" O'K., and the account on the books of the bank was in the same form. One of the rules printed in the pass-book provided that all payments to persons producing the pass-book should be valid to discharge defendant. Subsequent deposits were

Statement of case.

made, both depositors being present and each contributing to the fund. O'K. having died, plaintiff informed defendant's officers of that fact and that the wife of O'K. had the pass-book, and notified them not to pay the money to her. Defendant, however, on presentation of the book with letters of administration, issued to Mrs. O'K. on the estate of her husband, paid to her the whole deposit. In an action to recover the same, the court directed a verdict for plaintiff for the full amount. *Held* error; that the right of the bank to pay on the separate order of either of the depositors, and of each of them to demand payment was not terminated by the death of O'K.; that his authority being coupled with an interest vested on his death in his personal representative; but that defendant, after notice of plaintiff's right to the fund, with a prohibition as to payment to such representative, could not justify such a payment if the money of right, as between plaintiff and the estate of O'K., belonged to her; and that plaintiff was entitled to recover, but only to the amount of the deposits made by her.

It seems that the case was a proper one for an interpleader in which the rights of the respective claimants could be judicially ascertained.

(Argued May 29, 1882; decided June 20, 1882.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, in favor of plaintiffs, entered upon an order made February 7, 1881, which overruled defendant's exception and directed judgment on a verdict.

This action was brought to recover the amount of certain deposits made with defendant, a savings bank.

The material facts are stated in the opinion.

John E. Develin for appellant. The contract with the defendant was in writing and constituted an acknowledgment of an indebtedness by the bank, and that either of the two parties named is entitled to receive the amount of it. (*Allen v. Williamsburgh Savings Bk.*, 69 N. Y. 322.) The promise here is to either or each and not to both, and therefore is not a joint but, by unmistakable words, a several promise. (Bouvier's Law Dict., Words "Joint Contract"; 1 Parsons on Cont., chap. 2, §§ 1, 2.) This was not a partnership, or in the nature of a partnership transaction, on the part of O'Keefe and the plaintiff in entering into the agreement with the defendant.

Opinion of the Court, per ANDREWS, Ch. J.

(*King v. Sarria*, 69 N. Y. 30.) It was competent for the parties to agree in any manner they pleased, and having thus agreed in writing, no extraneous fact or parol testimony will be permitted to alter their agreement. (*Keightley v. Watson*, 3 Exch. 716; 1 Parsons on Cont., chap. 2, § 1, p. 19, note; Wharton's Law of Ev., §§ 936-956; *Record v. Chisum*, 25 Tex. 348; R. S., chap. 6, title 3, art. 1, § 6; 2 id. 82-3.) By having the pass-book, O'Keefe alone could meet the stipulation that the bank should not be obliged to pay unless the book was presented at its counter. (*Downes v. The Phoenix Bank of Charlestown*, 6 Hill, 297; *Payne v. Gardner*, 29 N. Y. 169-170.)

L. C. Dessar for respondent. The moneys deposited became a joint fund payable to the survivor. (1 Parsons on Cont. 31; *Blake v. Sanborn*, 8 Gray, 154; 1 Jones on Mortgages, § 135; 3 id., § 1283; *White v. Osborn*, 21 Wend. 72; *Tyler v. Tayler*, 8 Barb. 585.)

ANDREWS, Ch. J. A verdict was directed for the plaintiff for the whole amount of the deposit made by her and O'Keefe, notwithstanding the payment of the same by the bank, before the commencement of the action, to the administratrix of O'Keefe, on the ground that the legal title to the fund vested in the plaintiff, on the death of O'Keefe, as survivor, and that she alone was entitled to receive it. The account with the bank was opened in 1862, and the last deposit was made in 1871. Simultaneously with the first deposit, the usual savings bank pass-book, with rules printed thereon, was issued with the following heading: "Dr. The Emigrant Industrial Savings Bank, in account with John O'Keefe or Ellen Mulcahy, Cr.," and the account on the books of the bank was in the same form. There is no explanation of the reason for opening the account in this way, except what may be inferred from the relationship of aunt and nephew, existing between the plaintiff and O'Keefe, and the admission on the trial that when the first deposit was made, the plaintiff in the presence of O'Keefe,

said to the officers of the bank "that either of them, or both could draw the money." There is no distinct evidence as to the respective interests of the plaintiff and O'Keefe, in the money deposited with the defendant. It was admitted that they were both present when the deposits forming the account were made. The plaintiff testified that she "saved her husband's money and deposited it in the bank." It does not appear what portion of the money, if any, belonged to O'Keefe, but the evidence justifies the inference that each of the depositors contributed to the fund, and that as between themselves their interests therein were several, and not joint. One of the rules of the defendant, printed on the pass-book, provides that all payments to persons producing the pass-book, shall be valid payments to discharge the bank. O'Keefe died in 1873. The plaintiff, on the day after his burial, informed the officers of the bank of his death, and that Mrs. O'Keefe had the pass-book, and notified them "not to give her money to Mrs. O'Keefe when she should come with the bank-book," and asked them "what way she had for saving her money." The bank, however, a few days thereafter, not regarding the notice, paid the deposit to Mrs. O'Keefe, on her presenting the pass-book, with letters of administration issued to her on the estate of her husband. We are of opinion that as the evidence stood, the court erred in directing a verdict for the plaintiff for the full amount of the deposit. The principle seems to be settled, that the right of action on a bond held by two joint obligees, or on a promise for the payment of money to two joint promisees, vests on the death of one, in the survivor. (*Blake v. Sanborn*, 8 Gray, 154; 1 Parsons on Contracts, 31, and cases cited.) But the right of the deceased obligee or promisee is not extinguished by his death. The survivor will hold the security, and the proceeds, as trustee to the extent of the interest of the deceased joint obligee or promisee, in the debt or fund. If this was the bald case of a joint deposit, of a joint fund, belonging to the two depositors, it would seem to follow that the legal title to the deposit, vested on the death of O'Keefe in the plaintiff, and that the

Opinion of the Court, per ANDREWS, Ch. J.

liability of the bank at law, was not discharged by payment to his administrator. Whether in that case the payment to the extent of the actual interest of O'Keefe, would not be good in equity, is a question we need not now consider. But the transaction in this case was peculiar. It is quite plain that the account was opened in the form it was, to carry out the intention of the depositors that each should have the right to draw the money, and to justify the bank in paying on the separate order of either. The right of the bank thus to pay, and of each depositor to demand payment, was not we think terminated by the death of O'Keefe. The authority O'Keefe had, was coupled with an interest, and vested on his death in his personal representative. The bank agreed in substance to pay to either depositor, on the production of the pass-book. The several character of its obligation was not transformed by the death of O'Keefe, into an obligation to pay to the survivor alone. But when the bank had notice that the fund belonged to the plaintiff, and was prohibited by her from paying it to the representatives of O'Keefe, it could not thereafter justify a payment to the latter under the original authority, or by reason of the rule in the pass-book, if the money of right, as between the plaintiff and the estate of O'Keefe, belonged to the former. The case was a proper one for an interpleader, in which the rights of the respective claimants could be judicially ascertained. Having paid over the fund on the demand of Mrs. O'Keefe, the bank assumed the hazard of being compelled to pay again to the plaintiff, on her establishing her actual right as between her and the estate of O'Keefe. We think the plaintiff was not entitled to recover, except to the extent of her actual beneficial interest in the debt owing by the bank, and that the theory upon which the verdict was directed, cannot be sustained.

The judgment should therefore be reversed, and a new trial granted, costs to abide the event.

All concur, except TRACY, J., absent.

Judgment reversed.

THE NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW YORK, Appellant, v. THE MECHANICS' NATIONAL BANK OF NEWARK, NEW JERSEY, Respondent.

THE CORN EXCHANGE BANK, Appellant, v. THE SAME, Respondent.

THE WEST SIDE BANK, Appellant, v. THE SAME, Respondent.

An order vacating an attachment issued before judgment is not reviewable here.

A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may, under the Code of Civil Procedure (§ 682), move to vacate the attachment without being made a party to the action.

(Argued June 18, 1882; decided June 20, 1882.)

APPEALS from orders of the General Term of the Supreme Court, in the first judicial department, made April 10, 1882, which affirmed orders of Special Term vacating attachments issued before judgment in the actions above entitled.

The applications to vacate the attachments were made by Frederick Frelinghuysen, who was appointed receiver of the defendant, after the issuing and levy of the attachments.

George C. Lay, Jr., for appellants. The receiver, not having intervened in the action, has no *status* in court to make this motion. (*Allen v. Scandinavian Nat. Bk.*, 46 How. Pr. 71; *Tracy v. First Nat. Bk. of Selma*, 37 N. Y. 523; *In re Griswold*, 13 Barb. 412; *Ketcham v. Ketcham*, 1 Abb. [N. S.] 157; *Isham v. Ketchum*, 46 Barb. 43; *Macher v. Bancroft*, 15 Abb. Pr. 245.)

Aaron Pennington Whitehead for respondent. The receiver is entitled to make this motion. (Code of Civil Procedure, § 682; *Steuben County Bk. v. Alberger*, 78 N. Y. 252; *Woodmansee v. Rogers*, 20 Hun, 285; Throop's note to § 682.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. The orders appealed from affirmed orders of the Special Term vacating attachments issued before judgment against the property of the defendant. They relate to the mode of procedure, do not affect the merits of the action, and to some extent involve the exercise of discretion. It has therefore been the frequent practice of this court to dismiss an appeal in such cases (*Sartwell v. Field*, 68 N. Y. 341; *Wallace v. Castle*, id. 370), and that practice, for reasons stated in *Van Slyke v. Hyatt* (46 N. Y. 259); *Anonymous* (59 id. 313); *Martin v. Windsor Hotel Co.* (70 id. 101), must be followed in this instance.

The motions to vacate were by Frelinghuysen, who had been appointed receiver of defendant. It is objected by the appellants that as the receiver has not been made a party to the action, he had no standing in court or right to be heard as to the attachments, and cases are cited to that effect (*Tracy v. First Nat. Bank of Selma*, 37 N. Y. 523; *Allen v. Scandinavian Nat. Bank*, 46 How. Pr. 71; *In re Griswold*, 13 Barb. 412; *Ketchum v. Ketchum*, 1 Abb. [N. S.] 157; *Isham v. Ketchum*, 46 Barb. 43; *Thacher v. Bancroft*, 15 Abb. Pr. 243), but they all turned upon the provision of the Code of Procedure (§ 241), which gave the right to move to discharge the attachment, to a defendant only. This right is now extended (New Code, § 682) to any person who, after the attachment issued, acquired an interest in, or lien upon, the property attached. He may move by virtue of that relation, and need not be a party to the suit. (*Steuben Co. Bank v. Alberger*, 78 N. Y. 252.) The receiver comes within the terms of that section (U. S. R. S., § 5234; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; *Nat. Bank v. Colby*, 21 id. 609) and is entitled to be heard.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

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In the Matter of the Application of the LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY, Appellant, to Change the Route of the NEW YORK, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

In the Matter of the Application of the NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant, for Commissioners to Examine Route of the NEW YORK, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

As to whether, where the proposed route of a railroad company crosses the track of an existing company, the latter can apply for the appointment of commissioners, under the General Railroad Act (§ 22, chap. 140, Laws of 1850, as amended by § 1, chap. 560, Laws of 1871), to change such route, *quære*.

On appeal to this court brought to review the decision of the commissioners appointed for such purpose, only questions of law can be considered and determined, and all that can be done by the General Term of the Supreme Court, or by this court, is to send the report back where errors of law have been committed.

Where commissioners to change the route are appointed on the application of an existing railroad company, they have no power to determine the grade at which the proposed route shall cross the tracks of the petitioner.

The fact that the route as located by the new company runs through ground already appropriated by the petitioner for transfer, storage and depot purposes does not make it error for the commissioners to refuse to adopt the route proposed by the petitioner. The question, whether the new company has located its line over lands it cannot condemn for railroad purposes, is not one properly to be determined by said commissioners.

(Argued March 8, 1882 ; decided June 30, 1882.)

APPEALS from orders of the General Term of the Supreme Court, in the fourth judicial department, entered upon orders made October 28, 1881, which affirmed the decision of commissioners appointed under section 22 of the General Railroad Act, to examine the proposed route of the New York, Lackawanna and Western Railroad Company, in the county of Erie.

Statement of case.

Said proposed route crosses the lands and the tracks of the petitioners in the city of Buffalo. This route was affirmed by the commissioners.

The objections thereto are stated in the opinion.

Daniel H. McMillan for the L. S. & M. S. R. Co., appellant. The commissioners violated a legal right of the appellant in affirming the route proposed by the N. Y., L. & W. R. R. Co., as it crossed premises owned by the appellant for transfer, storage and depot purposes. (*Matter of B. & A. R. R.*, 53 N. Y. 574; *Matter of City of Buffalo*, 64 id. 547; *Matter of City of Buffalo*, 68 id. 171; *Matter of B., H. T. & W. Ry. Co.*, 79 id. 64; Laws of 1881, chap. 649, p. 890; 2 R. S. [7th ed.], § 1554.) The commissioners erred in predicated their determination on the ground that the route proposed by the appellant will substantially change the general route of the Lackawanna Company. (Laws of 1850, chap. 140, § 22 amended in 1871; McMaster's Railroad Law, p. 61.) The commissioners erred in refusing to consider the proposed routes with reference to their elevation, and in affirming the route proposed by the Lackawanna Company, upon the ground that they had no authority to determine that the crossing should be overhead as proposed by the Lake Shore Company, thus limiting their examination of the two routes to their alignment without reference to their vertical position. (Laws of 1850, chap. 140, § 22.) The General Term erred in affirming the determination of the commissioners, upon the ground of its limited power, and that it was not called upon without the aid of scientific advice or an examination of the *locus in quo* to overrule such determination upon questions of fact. (Laws of 1850, chap. 140, § 22; McMaster's Railroad Law, 61; *In re B. & L. R. R. Co.*, 77 N. Y. 575.)

John G. Milburn for the N. Y., L. E. & W. R. R. Co., appellant. The commissioners erred in affirming the proposed route of the respondent, for the reason that being laid across the freight yard of the appellant, it is one upon which the re-

Opinion of the Court, per TRACY, J.

spondent has no legal right to build a railroad. (*A. N. R. R. Co. v. Brownell*, 24 N. Y. 345; *B. & A. R. R. Co. v. Greenbush*, 52 id. 510; *Matter of B., H. T. & W. Ry. Co.*, 79 id. 68.) The commissioners erred in their decision that they had no power to determine in this proceeding whether that portion of the route of the respondent which crosses the lands and railroad tracks of the appellants should be at grade or at the elevation of the proposed alteration. (*Matter of the Petition of the L. I. R. R. Co.*, 45 N. Y. 364; *People, ex rel. R. R. Co., v. Tubbs*, 49 id. 356; *Norton v. R. R. Co.*, 61 Barb. 476; *People v. N. Y. C.*, 74 N. Y. 302.) The commissioners erred in affirming the proposed route of the respondent, for the reason that, being laid through the freight and transfer yard used by the appellant in connection with the Lake Shore & Michigan Southern Railway Company, it is one upon which the respondent has no legal right to build a railroad. (*A. & N. R. R. Co. v. Brownell*, 24 N. Y. 345; *B. & A. R. R. Co. v. Greenbush*, 52 id. 510; *Matter of B., H. T. & W. Ry. Co.*, 79 id. 68; Laws of 1881, chap. 649.)

Franklin D. Locke for respondent.

TRACY, J. Where the proposed route of a railroad company, as located by the filing of its map, crosses the track or tracks of an existing company, it may well be doubted whether the last-named company can apply for the appointment of commissioners under section 22 of the General Railroad Act, as amended by the act of 1871 (Laws of 1871, chap. 560, § 1), to change the route of the road proposed to be constructed. Section 28 of the same act would seem to provide the means of determining all questions involved, as between railroad companies, where one seeks to carry its line across the line of the other; but as this question is one which should perhaps be raised upon an application for the appointment of commissioners rather than upon a motion to confirm their report, and as the commissioners have refused to change the route of the proposed road, we do not think it necessary to decide it.

Opinion of the Court, per TRACY, J.

On an appeal brought to this court from the determination of commissioners appointed under section 22, we are necessarily limited to considering and determining questions of law. If this court had the power, it would not be practicable for it to determine the appeal on the merits. We have not, nor can we have, the evidence before us upon which the commissioners acted.

The law requires them to examine the two routes, and their conclusion must in no small degree be determined by such inspection. No change can be made by the commission without the concurrence of the civil engineer, and he does not concur in the change proposed. It is not within the power of the court, therefore, to determine that such a change should be made. The most the General Term or this court could do would be to send the report back where errors of law have been committed.

It is insisted that the commissioners erred in holding that they had no power to determine the grade at which the proposed route should cross the tracks of the petitioners, but that such power was vested in the commissioners to be appointed under subdivision 6, section 28. In this we think no error was committed. There can be no doubt that the powers of a commission appointed under section 28, to ascertain and determine the manner in which the line of one road shall be carried across the tracks of another, cannot be limited or abridged by any action taken by a commission appointed under section 22. "The points of crossing are not necessarily fixed by notice of the location of the new road, and failure of a company owning the previously constructed road to object to such location in fifteen days. The general provisions in regard to the location of a road are not applicable to the manner of crossing, and cannot deprive existing roads of any of the protection which the provisions in respect to crossings afford them." (*In re Boston, Hoosac Tunnel & W. R'way Co.*, 79 N. Y. 67.)

A commission appointed under section 28 may determine the "line or lines, the grade or grades, points and manner of such crossing, and whether the crossing shall be beneath, at, or

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above the existing grade, and upon the route designated on the map of the company seeking the crossing, required to be filed by section 22 of this act, or otherwise (Subd. 6, § 28, as amended by the Laws of 1880, chap. 583, § 1), as fully as it would have had if the commission provided by section 22 had never been appointed.

It is further urged that the commissioners erred in not adopting the route as proposed by the petitioners, because the route as located by the new company runs through grounds already appropriated by the petitioners for transfer, storage and depot purposes. We think such a question is not one that can properly be determined by commissioners appointed under section 22. If the new company has located its line over lands it cannot condemn for railroad purposes, a commission having the power to regulate the place and manner of crossing has ample authority to protect existing companies from such a violation of their rights.

We see no error of law committed by the commissioners appointed in these proceedings.

The orders of the General Term confirming the reports of the commissioners should be affirmed, with costs.

All concur.

Orders affirmed.

ARTHUR M. MURPHY, as Receiver, etc., Appellant, v. HENRI-
ETTA A. BRIGGS et al., Respondents.

Where a debtor has conveyed real estate in fraud of his creditors, and at his request his grantee has given a mortgage thereon to secure a debt of the grantor which existed at the time of the conveyance, to a creditor ignorant of its fraudulent character, the mortgage comes within the exception in the statute of frauds (2 R. S. 137, § 5), protecting the rights of purchasers in good faith and "for a valuable consideration," and although the conveyance be set aside in an action brought by other creditors, the mortgage cannot be affected.

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The pre-existing indebtedness constitutes a valuable consideration within the meaning of the statute.

Wood v. Robinson (23 N. Y. 564), distinguished.

(Argued June 2, 1882 ; decided June 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 16, 1880, which reversed in part and affirmed in part a judgment in favor of the plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 23 Hun, 95.)

This action was brought by plaintiff as receiver, appointed in proceedings supplementary to execution against defendant Lafayette Moore, to set aside, as fraudulent as to creditors, two deeds executed in February, 1878, one by said debtor to defendant Werner, and one by the latter to Mary E. Moore, wife of the debtor; also to set aside two mortgages upon the premises so conveyed, executed by Mrs. Moore at her husband's request, to the defendants Briggs and Whiting, to secure pre-existing debts of Mr. Moore.

The court found that the two conveyances were executed voluntarily and without any consideration, and were fraudulent and void as to Moore's creditors; that the mortgagees acquired no better right than Mrs. Moore acquired by the conveyance to her, and that the mortgages were void as to plaintiff and the judgment creditors. The General Term reversed the judgment so far as the same affected defendants Briggs and Whiting, or their mortgages, holding the same to be valid as against the plaintiff and the creditors he represented.

Further facts appear in the opinion.

Samuel Hand for appellant. The conveyance by Moore to his wife of the real estate was void as to the plaintiff and the judgment creditors, whom he represents as receiver, and as to them she obtained no title. (2 Edmonds' Statutes, 142; *Cole v. Tyler*, 65 N. Y. 73; *Savage v. Murphy*, 34 id. 508; *Case v. Phelps*, 39 id. 164; *Smart v. Bennett*, 4 Abb. Ct. App.

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above the existing grade, and upon the route designated on the map of the company seeking the crossing, required to be filed by section 22 of this act, or otherwise (Subd. 6, § 28, as amended by the Laws of 1880, chap. 583, § 1), as fully as it would have had if the commission provided by section 22 had never been appointed.

It is further urged that the commissioners erred in not adopting the route as proposed by the petitioners, because the route as located by the new company runs through grounds already appropriated by the petitioners for transfer, storage and depot purposes. We think such a question is not one that can properly be determined by commissioners appointed under section 22. If the new company has located its line over lands it cannot condemn for railroad purposes, a commission having the power to regulate the place and manner of crossing has ample authority to protect existing companies from such a violation of their rights.

We see no error of law committed by the commissioners appointed in these proceedings.

The orders of the General Term confirming the reports of the commissioners should be affirmed, with costs.

All concur.

Orders affirmed.

ARTHUR M. MURPHY, as Receiver, etc., Appellant, v. HENRIETTA A. BRIGGS et al., Respondents.

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Further facts appear in the opinion.

Samuel Hand for appellant. The conveyance by Moore to his wife of the real estate was void as to the plaintiff and the judgment creditors, whom he represents as receiver, and as to them she obtained no title. (2 Edmonds' Statutes, 142; *Cole v. Tyler*, 65 N. Y. 73; *Savage v. Murphy*, 34 id. 508; *Case v. Phelps*, 39 id. 164; *Smart v. Bennett*, 4 Abb. Ct. App.

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Dec. 253.) The mortgages executed by Mrs. Moore to the defendants Briggs and Whiting must fail as to the plaintiff to the same extent as her title as mortgagor, being a mere lien on such title. (*Barnard v. Campbell*, 55 N. Y. 461; *Lawrence v. Conklin*, 17 Hun, 228.) Neither defendant Briggs nor Whiting comes within the exception in the statute provided by section 5, 2 Revised Statutes, 137. (*Manhattan Bk. v. Evertson*, 6 Paige, 457; *Wood v. Robinson*, 22 N. Y. 564; *Weaver v. Barden*, 49 id. 291; *Spicer v. Waters*, 65 Barb. 227.) To constitute a *bona fide* purchaser it is not enough to show a conveyance good in form, but payment of the consideration must be made out. It must be actually paid, not merely secured to be paid. (*Barnard v. Campbell*, 58 N. Y. 73; *DeLancey v. Stearns*, 66 id. 157; *Cary v. White*, 52 id. 138; *Weaver v. Barden*, 49 id. 289; *Griffin v. Marquardt*, 17 id. 28; *Picket v. Barrow*, 29 Barb. 508; *Dickerson v. Tillinghast*, 4 Paige, 215; *Fox v. Clark*, Walk. [Mich.] 535; *Potter v. Stephens*, 40 Mo. 229; *Pond, Rec'r, v. Comstock*, 20 Hun, 494; *Bank v. Warner*, 12 id. 306, 308; *Solomon v. Moral*, 53 How. 342; *Chapman v. Ransom*, 44 Iowa, 377; *Potter v. Stephens*, 40 Mo. 229; *Tootle v. Dunn*, 6 Neb. 93; *Boardman v. Halliday*, 10 Paige, 223; *Averill v. Loucks*, 6 Barb. 470; *Sheldon v. Dodge*, 4 Denio, 217; *Boardman v. Halliday*, 10 Paige, 223; *Beardsley v. Arguenda*, 2 Seld. 522; *Chautauqua Bk. v. Risley*, 19 N. Y. 370; *Underwood v. Sutcliffe*, 77 id. 62; *Erickson v. Quin*, 15 Abb. [N. S.] 166; *Bergen v. Carman*, 79 N. Y. 146, 153; 77 id. 62.) The mortgages were of no effect until delivered. (2 R. S. 738, § 138.) Notice to defendant Whiting, at the time the mortgage was delivered to her, of the fraud in the conveyance by Moore to his wife was sufficient. (*Herlick v. Brennan*, 11 Hun, 194; *Williamson v. Brown*, 15 N. Y. 354; *Reed v. Gennon*, 50 id. 349; *Bergen v. Carman*, 79 id. 152.) The assignee is not a necessary party. (*Shultz v. Hoagland*, 85 N. Y. 468; *Cole v. Malcombe*, 66 id. 362.) The right of a judgment creditor to set aside a conveyance as fraudulent and void as to creditors is not affected by a voluntary general assign-

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- ment. (*Brownell v. Curtis*, 10 Paige, 211; *Leach v. Kelsey*, 7 Barb. 466; *Browning v. Hart*, 6 id. 91; *Andrews v. Roberts*, 16 Johns. 526; *Flower v. Cornish*, 19 Alb. L. J. 282; 22 id. 60; *Rapalee v. Stewart*, 27 N. Y. 310; *Matter of Assignment of Lewis*, 81 id. 422.)

J. I. Werner for respondents. The judge erred in assuming that the conveyance from Moore to his wife was a nullity and so utterly void as to afford no foundation for the respondents' mortgages; and that, therefore, the mortgages were likewise a nullity and void. (*Anderson v. Roberts*, 18 Johns. 515, 526; Bump on Fraudulent Conveyances [2d ed.], 481, 482.) Assuming that the conveyance from Moore to his wife was fraudulent as to his creditors, and therefore voidable, it does not follow that Moore and his wife had thereby deprived themselves of the power or right to make the new agreement. (Bump on Fraudulent Conveyances [2d ed.], 473; *Cramer v. Blood*, 57 Barb. 155; *S. C.*, 48 N. Y. 684; 1 Story's Eq. Jur. [12th ed.], §§ 381, 433, 434.) The new agreement was not necessary to uphold the mortgages from Mrs. Moore to the respondents. (Bump on Fraudulent Conveyances, 488, 489; *Pond v. Comstock*, 20 Hun, 492; *Waterbury v. Sturtevant*, 18 Wend. 353, 363.) The pre-existing indebtedness of Moore to the respondents constituted a "valuable consideration" for the mortgages, within the intent of the statute saving the rights of purchasers in good faith, etc. (*Seymour v. Wilson*, 19 N. Y. 417, 421; *Towsley v. McDonald*, 32 Barb. 604, 611; *Kirby v. Fitzgerald*, 31 N. Y. 417, 426; *Weaver v. Barden*, 49 id. 286, 300; *Carpenter v. Muren et al.*, 42 Barb. 300; 3 Lans. 167, 172; *Archer v. O'Brien*, 7 Hun, 146, 149; Bump on Fraudulent Conveyances [2d ed.], 15, 16, 178, 195, 223-4, 496, 574; 1 Story's Eq. Jur. [12th ed.], §§ 64c, 370, 371, 381; *Leitch v. Hollister*, 4 N. Y. 211, 215, 216; *Baker v. Bliss*, 39 id. 70, 80; *Dudley v. Danforth*, 61 id. 626; *Birdseye v. Ray*, 4 Hill, 158, 163; *Williams v. Shelly*, 37 N. Y. 375, 378; *Auburn Ex. Bk. v. Fitch*, 48 Barb. 344, 349; *Hale v. Stewart*, 7

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Hun, 591, 592; *Ledyard v. Butler*, 9 Paige, 132; *Pond v. Comstock*, 20 Hun, 492.) A mortgagee, though for a pre-existing debt, is a purchaser *pro tanto* for a valuable consideration within the meaning of the term "purchaser" as used in the statute of frauds. (*Birdseye v. Ray*, 4 Hill, 158; *Ledyard v. Butler*, 9 Paige, 132, 137; *Hall v. Arnold*, 15 Barb. 599; Bump on Fraudulent Conveyances [2d ed.], 473, and notes.) The mortgage of Mrs. Whiting, though unrecorded at the time of the trial, is valid and effectual, as against the judgments obtained subsequent to the execution and delivery thereof. (*Jackson, ex dem. Tuttle, v. Dubois*, 4 Johns. 216; *Jackson, ex dem. Stewart, v. Town*, 4 Cow. 599, 605-6; *Ledyard v. Butler*, 9 Paige, 132, 135.) On the principle that a creditor may take and hold as many securities as his debtor sees fit to give him, it is not material to the validity of Mrs. Briggs' mortgage that the notes for which it was given were not surrendered up before the trial. (Thomas on Mortgages, 132.)

MILLER, J. It may be assumed, we think, that the conveyances from Moore to Werner, and from Werner to Mrs. Moore were fraudulent and void. The principal question which remains to be determined is, whether the mortgages executed by Mrs. Moore are valid and in force.

The proof establishes, beyond controversy, that these mortgages were executed to secure demands due from Moore to the mortgagors who, when the conveyances were made, were *bona fide* creditors of Moore. It also appears and the findings establish that at the time of the execution of the mortgages the mortgagees had no knowledge as to the pecuniary affairs and condition of Mr. Moore, the grantor, and of his ability or inability to pay his creditors in full the amount which he owed; nor had they actual or constructive notice of the demands sought to be enforced in this action. The counsel for the plaintiff insists that the mortgages executed by Mrs. Moore "must fail as to the plaintiff, to the same extent as her title as mortgagor, being a mere lien upon such title." This position is

based upon the ground that if Mrs. Moore had no title she could not give a lien upon the premises, and even if her husband intended or wished that the defendants should have the mortgages, that this was not sufficient to create a lien upon the land by mortgages executed by her, and as he did not execute the mortgages no claim was acquired by virtue of Mrs. Moore's mortgages. This, we think, cannot be maintained, and the claim that neither of the defendants comes within the exception in the statute (2 R. S. 127, § 5) is not well supported, and even although the conveyance by Moore was fraudulent as to creditors, and hence should be declared void, it did not deprive Moore and his wife from entering into an agreement by which, in consideration of a transfer to her of a mortgage which was assigned to her, she should mortgage the land to secure Moore's indebtedness. The mortgages were only an appropriation of Moore's property to the payment of his honest debts, and whether this was done by the grantee of the same, with Moore's approval, or by Moore himself, could make no difference. If the title was in Moore he could have given a preference and created a lien to pay the indebtedness of the mortgagees, and the grantee having, with Moore's consent, done what the grantor could have done by applying the property to pay the demands of creditors, there is no ground for claiming that such transfer was invalid. (Bump on Fraudulent Conveyances, 488, 489; *Pond, Rec'r, v. Comstock*, 20 Hun, 492, affirmed on appeal in this court.)

The indebtedness of Moore to the mortgagees which existed at the time constituted a valid consideration for the mortgages within the statute, saving the rights of purchasers in good faith. When a transfer is made to a stranger, to bring himself within the provision of the statute as to a purchaser, he must show that he has an equity which is paramount to that of his vendor, and this can only be done by showing he has parted with value and is not chargeable with notice of the fraud. But where the transfer is to a creditor of the vendor a different principle prevails. It is not necessary to show a new consideration, as the transaction amounts to nothing more than the voluntary prefer-

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ence of one creditor over another. (*Seymour v. Wilson*, 19 N. Y. 417, 421.) The rights of the mortgagees as creditors to have their debts preferred by mortgages on the property of the debtor are equally equitable with the claims of the creditors, and no valid ground is apparent why they should be placed behind other creditors, when the liens of the latter are of a later date. A *bona fide* purchaser or mortgagee from a fraudulent grantee without notice of the fraud is entitled to a preference over a subsequent purchaser. A mortgagee is a purchaser to the extent of his interest. (*Ledyard v. Butler*, 9 Paige, 132.)

We are referred by the learned counsel for the appellant to numerous reported cases in support of the position that the mortgagees do not come within the exception contained in the statute cited; but, after a careful and critical examination, we are satisfied that none of them are in conflict with the rule laid down in *Seymour v. Wilson* (*supra*), and all of them may be distinguished from that adjudication. We do not deem it necessary to criticize closely the cases cited and shall be content to refer briefly to the case of *Wood v. Robinson* (22 N. Y. 564), which perhaps approaches nearer to support the claim of the appellant than any other decision. In that case it is held that when the conveyance to the wife was fraudulent, and a subsequent creditor of the husband procured from the wife a mortgage to secure an antecedent debt, that the statutory trust in favor of the creditor at the time of the transaction prevails over the equal equity and superior diligence of the subsequent creditor, and it is laid down that the grantee and incumbrancer who does not advance any thing takes the interest conveyed subject to any prior equity attaching to the subject. It appeared that the plaintiff was a prior judgment creditor and hence he had a prior equity which entitled him to a preference at the time of the conveyance to the wife of real estate paid for by the husband. This of course would take precedence over a mortgage subsequently executed to secure a debt of the husband. As the lien existed at the time of the conveyance to the wife, the equity was prior to that of the mortgage. Although it was found that the mortgagee had no notice or knowledge of this judgment, it is not stated

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that its officers were unaware that the premises were purchased with the money of the debtor, or that they were ignorant of his indebtedness and insolvency. It is thus apparent that the case last considered in no way conflicts with the case of *Seymour v. Wilson* (*supra*). The fact that the defendant Catharine Whiting, at the time the mortgage was delivered, not at the time of its execution, had notice of the facts and circumstances in relation to the fraudulent conveyances by Moore to his wife, and of his insolvency, does not, we think, affect her rights to the preference created by the mortgage. The mortgage was executed on the 28th of February, at which time she had no such notice; it was not delivered until the 8th day of April afterward. The mortgage was merely applying the property for the benefit of creditors which was a rescinding of the fraudulent contract and entering into a new contract for its sale or transfer, which if made in good faith will not be contaminated by the fraud of the first contract. The law does not deprive parties of the right to restore property to legitimate purposes which has been fraudulently appropriated, and we are unable to discover any valid objection to a contract made with this object, when if the party whose debt is secured has notice after a conveyance to him of the original fraudulent conveyances, if the same is applied to the payment of the grantor's debts. (See Bump on Fraudulent Conveyances, *supra*, 473, and cases cited; *Cramer v. Blood*, 57 Barb. 155, affirmed in 48 N. Y. 684; 1 Story's Eq. Jur. 434.)

We think that the General Term was right, and the judgment as modified by them should be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed.

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In the Matter of the Application of the NEW YORK AND WEST SHORE RAILROAD COMPANY to Acquire Title to Lands of ELIZABETH WALSH et al.

In proceedings by a railroad corporation to acquire title to lands under the water of the Hudson river which had been granted by the State to the owners of the uplands, the petition contained an offer on the part of

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the company to construct a draw-bridge to give access from the river to the docks of the land-owners. After an order had been made and appealed from appointing commissioners, on application of the company an order was granted giving it leave to withdraw the offer and to amend the petition accordingly. *Held*, that the court had no power to so amend the petition; that no such power was given by the provision of the General Railroad Act (§ 20, chap. 140, Laws of 1850), which authorizes the correction of "any defect or informality."

Matter N. Y. & W. S. R. R. Co. (27 Hun, 57), reversed.

(Argued June 13, 1882; decided June 30, 1882.)

APPEAL from order of the General Term of the Supreme Court, made May 8, 1882, which affirmed two orders of Special Term, one of which appointed commissioners to ascertain and appraise the compensation to be paid certain land-owners for lands proposed to be taken by the New York, West Shore and Buffalo Railroad Company, for the purposes of its incorporation. The other allowed an amendment of the petition upon which the proceedings were instituted, by striking out a clause in and by which the company agreed, in the construction of its roadway, to construct a draw-bridge by which free and unobstructed access could be given to the docks of the land-owners from the Hudson river. (Reported below, 27 Hun, 57.)

The lands proposed to be taken lie under the waters of the said river in front of docks erected by the owners of the uplands, and had been granted by the State to said owners.

E. A. Brewster, *Wm. W. Badger* and *G. Tillotson* for appellants. The draw-bridge being a matter of right, it was error in the court below to allow the petition to be amended after appeal by striking out the provisions in regard to it. (*Jolly v. T. H. Bridge Co.*, 6 McLean, 242; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. 395; *id.* 76.)

C. F. Brown for respondent. The court had power to amend the petition by striking from it the allegation in reference to a draw-bridge. (Laws of 1850, chap. 40, § 20; *T. & B. R. R. Co. v. N. O. Tpke. Co.*, 16 Barb. 104; *People v. D. & H. C. R. R. Co.*, 58 N. Y. 152.)

Opinion *per Curiam*.

Per Curiam. The decision of this court *In re N. Y. C. & H. R. R. Co.* (77 N. Y. 248) disposes of all the questions raised upon this appeal adversely to the appellants, except the point urged that the court had no power to allow the railroad company to amend the petition by striking out the allegation in regard to a draw-bridge after the order appointing commissioners had been made and appealed from.

In regard to this question we think the Special Term erred in allowing the amendment. The proceedings are statutory, in derogation of the common law, and hence the statute should be substantially followed. The petition which was served, and upon which the order was granted, contained an offer of a draw-bridge, and without this, for any thing which appears, the application may have been refused by the court. Being the foundation of all the subsequent proceedings, and the owner of the land having a right to file an answer to the same, the alteration in regard to this allegation was of a vital character, and the granting or withholding of the draw-bridge, and cutting off the right of the riparian owner from the river or from furnishing access to the same, may have made a material difference. As it stands, no opportunity has been furnished to answer the same, and the appellant has been deprived of a right by means of the order granting the amendment. Such being the case, the court exceeded its power in making the order.

The claim that the court had power to amend the petition under section 20 of chapter 140 of the Laws of 1850 has no force, and that provision is limited to "any defect or informality" and does not embrace an entire change of the ground upon which the application is founded, and that too after an appeal has been taken, and the Special Term has passed upon its merits.

For the reason stated, the order of the General Term should be reversed, and as the petitioner does not seek to maintain its right to take the land upon the original application, the proceedings should be dismissed, with costs.

All concur; EARL, J., in result.

Judgment accordingly.

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JAMES McMULLEN, Appellant, v. PATRICK RAFFERTY, Respondent.

One H. executed and delivered to plaintiff a non-negotiable note, made payable on demand; upon the back of which the defendant had written his name. In an action thereon *held*, that defendant did not, in a commercial sense, become an indorser, but could be treated by plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand; that the statute of limitations then began to run in his favor, and as the action was commenced more than six years after date of note, it was barred by said statute.

Also, *held*, that payments of interest by H., although with the knowledge of defendant, did not prevent the running of the statute; to have that effect they must have been made by him, or for him, by his authorized agent.

(Argued June 14, 1882; decided June 30, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made at the March term, 1881, which affirmed a judgment in favor of defendant, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 24 Hun, 363.)

The nature of the action and the material facts are stated in the opinion.

Samuel Hand for appellant. The statute of limitations did not begin to run until after the default in the payment of interest, which was July 1, 1878, or until after demand. (*Merritt v. Todd*, 23 N. Y. 28; *Payne v. Gardner*, 29 id. 146; *Nelson v. Bostwick*, 5 Hill, 37, 39, 42; *Douglass v. Rathbone*, id. 143; *Cromwell v. Hewitt*, 40 N. Y. 491; *Herrick v. Wolvorton*, 41 id. 600, 601; *Hernandez v. Stilwell*, 7 Daly, 360; *Warwood v. Tresberville*, 6 Mod. 200.) The guaranty being that Hughes would pay, with interest, the presumption is that he would not be immediately called upon to pay, and for a "reasonable time," at least, there was no dishonor of the note, and no failure to pay by Hughes, according to its terms, which would make the defendant liable, or raise the presumption of dishonor, which would set the statute running as to

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him. (*Wethey v. Andrews*, 3 Hill, 582; *Barough v. White*, 4 B. & C. 325.) Assuming that the statute of limitations would otherwise have been a bar to the action, it was removed by the payments of interest which were made by Hughes, by and with the authority and assent of the defendant, every six months, down to the maturity of the notes. (*Schindel v. Yates*, 46 Md. 604; *Zent v. Hart* 8 Barr. [Penn.] 337; *Sigourney v. Drury*, 14 Pick. 387; *Gildersleeve v. Landon*, 73 N. Y. 609; *Mott v. Consumers' Ice Co.*, id. 543.) The payments of interest having been ratified by the defendant, he is bound to the same extent as if he had made them himself. (*First Nat. Bk. of Utica v. Ballou*, 49 N. Y. 155; *Winchell v. Hicks*, 18 id. 558; 563; *Haight v. Avery*, 16 Hun, 252.) It is immaterial when an act of ratification takes place. Whenever done, it relates back, and is equivalent to a prior authority. (*Hoyt v. Thompson's Exr.*, 19 N. Y. 207, 219; *Fleckner v. The U. S. Bk.*, 8 Wheat. 363; *Bird v. Brown*, 4 Exch. 798, 799.)

Warren G. Brown for respondent. The cause of action accrued against the defendant at the date of the notes, because one who writes his name on the back of a non-negotiable promissory note is to be treated as a maker and not an indorser, entitled to demand and notice. (*Cornwall v. Hewitt*, 40 N. Y. 461; *Richards v. Waring*, 1 Keyes, 576; *Gilbert v. Slocum*, 10 Barb. 402; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 id. 19.) The same result follows if defendant is to be regarded as a guarantor. (*Bartholomew v. Seaman*, 25 Hun, 619.) In the case of a note payable on demand, the statute of limitations runs from its date. (*Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *Hirst v. Brooks*, 50 Barb. 334; *DeLavallette v. Wendt*, 75 N. Y. 579, 583.) The rule is the same whether the note is made with interest or without interest. (*Wheeler v. Warner*, 47 N. Y. 519; *Howland v. Edmonds*, 24 id. 307.) The date of an instrument is presumed to be the time of its execution. (*Broeck v. Cole*, 4 Sandf. 79.) Even the indorsement of a note is presumed to be

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cotemporaneous with its date. (*Pinkerton v. Bailey*, 8 Wend. 600; *Union Bk. v. Willis*, 8 Metc. [Mass.] 504; *Benthall v. Judkins*, 13 id. 265; *Draper v. Snow*, 20 N. Y. 331.) The payment of interest by Hughes, the principal debtor, does not take this case out of the statute of limitations as to defendant Rafferty, the surety. (*Hulbert v. Nichol*, 20 Hun, 445; *Smith v. Ryan*, 66 N. Y. 352, 356; *Shoemaker v. Benedict*, 1 Kern. 176; *Van Kueran v. Parmlee*, 2 Comst. 523; *Winchell v. Hicks*, 18 N. Y. 558; *Pickett v. Leonard*, 34 id. 175; *Harper v. Fairly*, 53 id. 442.)

EARL, J. This action was brought against the defendant as indorser of two promissory notes, precisely alike, written as follows:

“NEW YORK, 20th February, 1873.

On demand I promise to pay Mr. James McMullen twelve hundred dollars for value received with interest from January 1, 1873

\$1200.00.

W. J. HUGHES.”

The defendant's name was written upon the back of each note, without any other words over it. The action was commenced February 24, 1879, more than six years after the date of the notes, and the trial judge held that they were barred by the statute of limitations at that time, and on that ground directed a verdict for the defendant. That direction presents the only point for our consideration.

As these were non-negotiable notes, the defendant did not, in a commercial sense, become an indorser of them with the rights and liabilities of a simple indorser. But he can be held as a maker of the notes, or as a guarantor of their payment. (*Cromwell v. Hewitt*, 40 N. Y. 491.)

In the case of a note payable on demand the statute of limitations begins to run in favor of the maker from its date, and this is so whether the note be payable with or without interest. (*Wenman v. The Mohawk Insurance Co.*, 13 Wend. 267; *Howland v. Edmonds*, 24 N. Y. 307; *Wheeler v. Warner*, 47 id. 519; 7 Am. Rep. 478; *DeLavallette v. Wendt*, 75

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N. Y. 579 ; 31 Am. Rep. 494 ; *Bartholomew v. Seaman*, 25 Hun, 619.) The word "demand" is not treated as part of the contract, but is used to show that the debt is due.

As the defendant could at all times be treated as the maker of these notes, and the plaintiff could, therefore, have sued him upon them at any time without any previous demand, the cause of action upon them must be held to have accrued against him at the date of the notes ; and this is so although the plaintiff had the option also to treat him as a guarantor. The same result, however, will follow if the defendant be treated as guarantor of the notes. Then his obligation is co-extensive with that of the maker, and the cause of action accrued against him at the precise moment when it accrued against the maker. If he guaranteed payment of the notes, then he was bound to pay just as the maker was bound to pay, to-wit, without any demand. If he guaranteed performance by the maker of his contract, then it was a guaranty of the precise contract made by the maker and the demand was no part of that contract, and the same moment that the maker failed in law to perform his contract, a cause of action accrued against the defendant upon which he could be sued. So in any aspect of this case a cause of action upon these notes accrued against the defendant more than six years before the commencement of the action.

If the defendant had made it a part of his collateral contract of guaranty that the maker should pay the notes upon demand, then his obligation would not have matured until an actual demand of payment had been made upon the maker. (*Nelson v. Bostwick*, 5 Hill, 37.) But this is not such a case. Here the defendant guaranteed the maker's contract, and therefore came under precisely the same obligation of payment as rested upon the maker.

Hughes, the maker, paid the interest on these notes semi-annually down to January 1, 1878, and there was some evidence that he did it with the knowledge of the defendant, and hence the claim is that such payments prevent the running of the statute of limitations. But it is the settled law of this State that payments made by one joint contractor cannot save

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from the statute of limitations a claim against another joint contractor, and that payments made by the principal debtor cannot save from the statute a claim against the surety ; and it makes no difference that the payments were made with the knowledge of the other party liable for the same debt. To make payments effective against a party to save a claim from the statute, they must have been made by him, or for him by his authorized agent. One joint contractor may make payments as agent for all the contractors, or the principal debtor may make payments for and in the name of his surety as his agent, or payments may thus be made in the name of all the joint contractors, or of the surety without previous authority, but be subsequently ratified, and in all such cases the running of the statute may be prevented. (*The First National Bank of Utica v. Ballou*, 49 N. Y. 155.) But in all cases to make the payments effective they must by previous authorization or subsequent ratification be the payments of the party sought to be affected by them.

The further claim is made that the defendant is bound by these payments because he alleged them in his answer, and that he thus ratified them. But the payments were not made in his name or for him, and he did not allege them in his answer as payments made by himself or for him, but as payments made upon the notes by Hughes, the principal debtor. He certainly could avail himself of such payments without losing the right to insist upon the bar of the statute.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., who does not vote.

Judgment affirmed.

THE PEOPLE, ex rel. JAMES TRAINOR, Appellant, v. SAMUEL N. BAKER, Keeper, etc., Respondent.

Where the petition on application for a writ of *habeas corpus* to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment,

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and the writ did not require the keeper to return the warrant or other instrument under and by virtue of which he detained the relator, but simply required a return of the cause of his imprisonment, *held*, that certified minutes of the court showing judgment and the sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant.

It seems that a warrant of commitment in such case is simply an authority and direction to the sheriff or other officer to take the prisoner to the penitentiary ; he is not detained by virtue thereof, but by virtue of the judgment, and if the officer furnishes the keeper with a certified copy of the judgment, it is sufficient evidence of his authority, and he need not retain the *mittimus*.

It seems also if the prisoner has been properly and legally sentenced to prison he cannot be released, because of a defect in the *mittimus*. When he is safely in the proper custody, there is no office for a *mittimus* to perform.

Where the certified copy of the minutes of the court furnished the keeper imperfectly described the crime of which the prisoner was convicted, *held*, that the keeper could, upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was ; and so, that the sentence was legal, and the detention authorized.

It seems that this cannot be shown by parol evidence, but should be proved by the records.

Where, however, the facts were shown by affidavit without objection, *held*, that the court was authorized to hold it sufficient and to act thereon. A certified copy of judgment described the offense of which the prisoner was convicted as " an assault and resisting an officer ; " the sentence was imprisonment for one year and a fine of \$500, the prisoner to stand committed until payment, etc. *Held*, that this did not describe the crime of resisting the execution of process within the meaning of the statutory provision declaring that offense (§ 17, chap. 69, Laws of 1845), but simply showed a conviction for an assault and battery.

But *held* that if the sentence was excessive, the sentence to imprisonment for one year was authorized and the balance only could be held void ; that the prisoner, therefore, was not entitled to his discharge until the expiration of the year.

(Argued June 16, 1882 ; decided June 30, 1882.)

APPEAL from order of the General Term of the Superior Court of Buffalo, made May 15, 1882, which affirmed an order of Special Term refusing, upon a hearing on return to a writ of *habeas corpus*, to discharge the relator and remanding him back to custody.

The facts appear sufficiently in the opinion.

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Wm. W. Lyon for appellant. The certified copy of the minutes of the Court of Sessions of Genesee county is insufficient as a warrant of commitment or a *mittimus* to the Erie county penitentiary. (Laws of 1846, chap. 77; Laws of 1853, chap. 587; Laws of 1858, chap. 139; Laws of 1874, chap. 209; 3 R. S. [6th ed.]; 1062, § 31, Laws of 1876, chap. 108.) The minutes show that the offense with which the prisoner is charged is "an assault and resisting an officer." No such crime or offense is known under the common or statute law, and a finding of such fact by the jury will not authorize a punishment. (*People v. Cooper*, 13 Wend. 379.) If it should be held, that one charged with "assault and resisting an officer" may be convicted of the offense of assault, and that the allegation as to resisting is only a statement of aggravating circumstances, it leaves only the assault to be disposed of. An assault is only a misdemeanor. (2 Bish. C. L. 55; *Commonwealth v. Barlow*, 4 Mass. 439; *People v. Wilson*, 9 Cal. 259; *Commonwealth v. McLaughlin*, 12 Cush. 612; *People v. Davis*, 4 Park. Cr. 61.) Common-law punishments have been abolished. (3 R. S. 990, § 19.) Sentences must be given under and in pursuance of statutes. (3 R. S. 983, § 103; 56 N. Y. 324; *Geyger v. Story*, 1 Dallas [Penn.], 146; *Herrick v. Smith*, 1 Gray, 50; *Ex parte Lange*, 18 Wall. 163; *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 591; *Ex parte Paige*, 49 Mo. 293; *People v. McLeod*, 3 Hill, 661, note 32; *Riley v. State*, 16 Conn. 47; *Pickett v. State*, 22 Ohio St. 411; 3 Hill, 661; 19 Wall. 176; *Hanney v. State*, 5 Wis. 533; *Howell v. State*, 1 Or. 245; *Elliott v. People*, 13 Mich. 365; *O'Neil v. People*, 15 id. 281.) Upon the return of the *habeas corpus*, the court has power either to remand the prisoner, if the sentence and process are regular, or if irregular or void, to discharge him. (Code of Civil Procedure, § 2032; *Sheppard v. People*, 25 N. Y. 419; *Sheppard v. Commonwealth*, 2 Metc. 419; *Christian v. Commonwealth*, 5 id. 230; *O'Leary v. People*, 4 Park. Cr. 187; *Rex v. Ellis*, 5 Barn. & Cress. 395; *King v. Bonnin*, 7 Ad. & Ell. 58.)

Opinion of the Court, per EARL, J.

Safford E. North for respondent. It is not necessary that the cause of imprisonment should be stated with technical accuracy. Error, irregularity, or want of form, is no objection, nor is any defect which may be amended or remedied by further entry or motion. (*People v. Cavanagh*, 2 Park. Cr. 650; *People v. Nevens*, 1 Hill, 154; *Regina v. Paty*, 2 Ld. Raym. 1105; *Rex v. Bethel*, 5 Mod. 1923; *People v. McLeod*, 1 Hill, 377; *S. C.*, 3 id. 635, notes 31, 38; *People, ex rel. Wolf, v. Jacobs*, 66 N. Y. 8; *People, ex rel. Tweed, v. Liscomb*, 60 id. 559; 23 Wend. 638; 2 Daly, 530; *Yates v. Lansing*, 9 Johns. 421; *Foot v. Stevens*, 17 Wend. 438; *Ex parte Kellogg*, 6 Vt. 509; *Ross Case*, 2 Pick. 165; *Ex parte Kearney*, 7 Wheat. 38; *Sheriff of Middlesex*, 11 Ad. & El. 273; *Riley's Case*, 2 Pick. 172; *People v. Cassels*, 5 Hill, 164.) The Court of Sessions is a court of superior jurisdiction, and jurisdiction of the person upon whom it passes judgment will, therefore, be presumed. (*People v. Cavanagh*, 2 Park. 650; *Foot v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 id. 40; *People v. Nevens*, 1 Hill, 154; 4 Blackst. Com. 391-2; 28 N. Y. 656; *Peacock v. Bell*, 3 Saund. 73.) The indictment contained counts for assault and battery, and the conviction is certainly good, and the commitment sufficient for this offense. (*Matter of Sweatman*, 1 Cow. 144; *Rex v. Collyer*, Say, 44; *Yates Case*, 4 Johns. 3443-53; *Taff v. State*, 39 Conn. 82; *State v. James*, 37 id. 355; *Ex parte Lange*, 18 Wall. 163; *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559; *People, ex rel. Wolf, v. Jacobs*, 66 id. 8.) The relator cannot be relieved summarily by *habeas corpus*. (Code of Civil Proc., § 2016; *People v. Cavanagh*, 2 Park. 650; *Matter of Percy*, 2 Daly, 530; *People v. Nevens*, 1 Hill, 154; *Tweed's Case*, 60 N. Y. 570.)

EARL, J. The relator was tried and convicted of a crime in the Court of Sessions of Genesee county, in January, 1882, and he was sentenced to be imprisoned in the Erie county penitentiary, for the term of one year, and to pay a fine of \$500, and to stand committed in the penitentiary until the fine was paid, not exceeding one day's imprisonment for each dollar of the fine.

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In pursuance of this sentence he was taken to the penitentiary and there imprisoned. Afterward in the same month, claiming that he was illegally detained in prison, he applied to a judge of the Buffalo Superior Court for a writ of *habeas corpus* that he might be discharged from such imprisonment, and the writ was granted, directed to the keeper of the penitentiary who made return thereto to the Special Term of that court that he held the relator by virtue of a warrant or *mittimus* which he produced and of which the following is a copy, to-wit:

“At a Court of Sessions held at the court-house in the village of Batavia, and for the county of Genesee, commencing on the second Monday of January, 1882.

Hon. LUCIUS N. BANGS, County Judge, presiding.

WM. S. COE, M. NELSON MOULTHROP, Session Justices.

The People
agst.
James Trainor.

} *Indictment for assault
and resisting an officer.*

Defendant indicted for an assault and resisting an officer and having been convicted of said offense by the verdict of a jury, is this 10th day of January, 1882, sentenced to be imprisoned in the Erie county penitentiary, N. Y., for the term of one year, and to pay a fine of \$500, and to stand committed to said penitentiary until said fine is paid, not exceeding one day's imprisonment for each dollar of said fine.

STATE OF NEW YORK, }
Genesee County Clerk's Office, } ss.:

I certify that the above is a true extract from the minutes of said court kept by me as clerk thereof.

Witness the seal of said court, this 10th day of January, 1882.

{ Co. Cl'k. }
{ L. s. }

CARLOS A. HULL, *Clerk.*”

The court, after hearing the relator and the keeper, declined to discharge the relator, and remanded him to the custody of

the keeper. From that decision the relator appealed to the General Term of the Superior Court, and from affirmance there to this court.

The statutes (Chap. 587, Laws of 1853; chap. 139, Laws of 1858; chap. 209, Laws of 1874, and chap. 108, Laws of 1876) seem to require that after a criminal has been sentenced to confinement in a penitentiary, a warrant of commitment shall be signed by the judge, justice or magistrate giving the sentence, or by the clerk of the court. And the claim here is that no such warrant was signed in this case or held by the keeper of the penitentiary, and that, therefore, the relator could not be detained.

There was no allegation in the petition for the writ that the relator was detained without a proper warrant of commitment, and the writ did not command the keeper to return the warrant or other instrument under or by virtue of which he detained the relator. It commanded him to return the cause of his imprisonment and detention, and the certified minutes of the court, showing the sentence imposed, sufficiently answered the writ and showed the cause of the detention.

But the relator was not detained or required to be detained by virtue of any warrant. He was detained by virtue of the judgment of the court, and that judgment was a sufficient authority for his detention. The warrant of commitment is simply an authority and direction to the sheriff or other officer to convey the prisoner to the penitentiary. That needs not necessarily to be left with the keeper. If he has no other evidence of his authority to detain the prisoner he should have that. But if the officer who brings a prisoner to the penitentiary furnished the keeper with a certified copy of the judgment of the court, then that is sufficient evidence of the keeper's authority, and he needs to have no other. A prisoner who has been properly and legally sentenced to prison cannot be released simply because there is an imperfection in what is commonly called the *mittimus*. A proper *mittimus* can, if needed, be supplied at any time, and if the prisoner is safely in the proper custody, there is no office for a *mittimus* to perform.

The further claim is made that the sentence was illegal and excessive, and that, therefore, the relator should be discharged. The district attorney of Genesee county, who appeared for the keeper, claims that the relator was convicted of the crime of resisting a sheriff in the execution of process under section 17, chapter 69 of the Laws of 1845, which reads as follows: "Every person who shall resist, or enter into a combination to resist, the execution of process shall be guilty of a misdemeanor, and be punished by imprisonment in the county jail for a term not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment in the discretion of the court." If convicted under that statute, the sentence of the relator was clearly regular and legal. But the counsel for the relator claims that the minutes of the court showed that he was not convicted of that crime, but that he was convicted simply of an assault, and that for that he could have been sentenced at most to be imprisoned for one year, and to pay a fine of \$250 only. Looking at the minutes of the court below, this claim seems to be well founded. The offense there is described as an assault and resisting an officer, and that does not describe a crime under the statute above cited. Simply assaulting and resisting an officer can be nothing more than an assault and battery, and punishable as such.

But we have no doubt that if the minutes of the court furnished to the keeper imperfectly described the crime of which the relator was convicted, he could, upon the return to the writ, show by the records of the court what the precise crime was, and thus that the sentence was regular and legal, and the detention authorized thereby. It is the judgment of the court which authorizes the detention, and that can always be shown in justification of the detention. But that cannot be shown by parol evidence, but should be proved by the records of the court. If the records are imperfect, they may be amended so as to conform to the actual facts. Here, upon the hearing on the return to the writ, instead of producing or proving the records of the court by a certified copy thereof, as would have been most proper, and, indeed, required, if insisted on by the relator, the district attorney showed, by his affidavit, that the relator was actually convicted and sentenced under the

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statute above cited. If this form of proof was not objected to (and it does not appear to have been objected to), the court was authorized to hold it sufficient, and to act upon it.

But, even if we must hold upon all that appears in the record that the relator was convicted of a simple assault and battery, he would not be entitled to his discharge, for then the sentence to imprisonment for one year was authorized and legal. That is a separate portion of the sentence, complete in itself, and the balance of the sentence can be held void, and disregarded. The whole sentence is not illegal and void because of the excess. Such is the settled law in this State. (*Matter of Sweatman*, 1 Cow. 144; *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211; *People, ex rel. Woolf, v. Jacobs*, 66 N. Y. 8.) In any event, therefore, the keeper had the right to detain the relator for the one year, and that is sufficient to justify the judgment below, which should, therefore, be affirmed

All concur.

Order affirmed.

THE NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW YORK, Appellant, v. THE MECHANICS' NATIONAL BANK OF NEWARK, N. J., Respondent.

THE CORN EXCHANGE BANK, Appellant, v. Same Respondent.

THE WEST SIDE BANK, Appellant, v. Same Respondent.

A law creating a corporation may impose upon parties dealing with it such restrictions as the enacting power may deem proper in applying or subjecting its assets to the discharge of its obligations, and may provide that any one or more of the usual remedies of creditors shall in certain cases be withheld from them.

Under the National Banking Act (U. S. R. S., § 5798), an attachment is prohibited and may not issue out of a State court against a National bank which is or is about to become insolvent.

(Argued June 27, 1882; decided June 30, 1882.)

The further claim is made that the sentence was illegal and excessive, and that, therefore, the relator should be discharged. The district attorney of Genesee county, who appeared for the keeper, claims that the relator was convicted of the crime of resisting a sheriff in the execution of process under section 17, chapter 69 of the Laws of 1845, which reads as follows: "Every person who shall resist, or enter into a combination to resist, the execution of process shall be guilty of a misdemeanor, and be punished by imprisonment in the county jail for a term not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment in the discretion of the court." If convicted under that statute, the sentence of the relator was clearly regular and legal. But the counsel for the relator claims that the minutes of the court showed that he was not convicted of that crime, but that he was convicted simply of an assault, and that for that he could have been sentenced at most to be imprisoned for one year, and to pay a fine of \$250 only. Looking at the minutes of the court below, this claim seems to be well founded. The offense there is described as an assault and resisting an officer, and that does not describe a crime under the statute above cited. Simply assaulting and resisting an officer can be nothing more than an assault and battery, and punishable as such.

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All concur.

Order affirmed.

THE NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW YORK, Appellant, v. THE MECHANICS' NATIONAL BANK OF NEWARK, N. J., Respondent.

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THE WEST SIDE BANK, Appellant, v. Same Respondent.

A law creating a corporation may impose upon parties dealing with it such restrictions as the enacting power may deem proper in applying or subjecting its assets to the discharge of its obligations, and may provide that any one or more of the usual remedies of creditors shall in certain cases be withheld from them.

Under the National Banking Act (U. S. R. S., § 5798), an attachment is prohibited and may not issue out of a State court against a National bank which is or is about to become insolvent.

(Argued June 27, 1882; decided June 30, 1882.)

Opinion of the Court, per DANFORTH, J.

THESE are motions to correct remittiturs herein. The cases are reported *ante*, p. 440.

The grounds of the motion are stated in the opinion.

George C. Lay, Jr., for motion.

Aaron Pennington Whitehead, opposed.

DANFORTH, J. The appellants ask to have the *remittitur* in these several cases recalled, in order that application may be made for such amendment to the orders appealed from, as will show that they were made upon the ground that the justice of the Supreme Court who granted the attachments had no power or jurisdiction in the premises. If this fact appeared, it would present a case for our consideration (*Allen v. Meyer*, 73 N. Y. 1; *Dunlop v. Patterson Fire Ins. Co.*, 74 id. 145; 30 Am. Rep. 283), and if likely to be disposed of in a manner favorable to the appellants, we should grant the application.

But upon the hearing of the appeal, the point which upon such amendment would be before us was fully presented by counsel for the appellants, and answered to by the respondents. It was ably argued by both, and although we were constrained, in accordance with long-settled practice in such cases, to dismiss the appeals, the question was considered by us, and the conclusion reached that the attachment was improvidently issued. In the recent case of *Robinson v. The Natl. Bk. of Newberne* (81 N. Y. 385; 37 Am. Rep. 508), the same general question was before us for judgment. In that case, an attachment had been issued against the property of a solvent National banking association, and we thought it should be upheld upon the ground that the prohibition against such process contained in section 5242 of the United States Revised Statutes, applied only to an insolvent corporation, or one about to become so.

It is apparent, from the papers in the cases now here, that the defendants in the attachment proceedings are in that condition, and we find no reason for doubting that they are within

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the prohibition and intent of the statute (*supra*). "No attachment," it says, "shall be issued against any such association, or its property, before final judgment in any suit, action, or proceeding in any State * * * court."

As a corporation can act only in the mode and within the limitations prescribed by the law creating it, the same law may impose upon parties dealing with the corporation such restrictions as the enacting power deems proper, in preserving, applying, or subjecting its assets to the discharge of its obligations, and may, among other things, provide that any one, or more, of the usual remedies of creditors against a debtor, shall in certain cases be withheld.

The laws of this State not only render invalid any transfer of property, or payment made, but any judgment confessed, or lien created by a moneyed corporation when insolvent, or in contemplation of insolvency, with intent of giving any preference to any creditor. (Title 2, part 1, chap. 18, art. 1, § 9, 1 R. S., p. 591.) The object and spirit of this act, undoubtedly, is to secure an equal distribution of the effects of a moneyed corporation among its creditors, in case of insolvency. Its validity has not been doubted. We have given this construction to the statute of the United States containing the prohibition above cited (*Robinson v. Natl. Bank of Newberne, supra*), and so it is directly held in *National Bank v. Colby* (21 Wall. 609).

If the orders were amended in the manner indicated, these views would lead to their affirmance, and it, therefore, would not benefit the appellants to grant their motion.

The motion should be denied, with costs.

All concur.

Motion denied.

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MARY DEVLIN, as Administratrix, etc., Appellant, v. JOSIAH T. SMITH et al., Respondents.

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| 89 | 470 |
| 126 | 109 |
| 89 | 470 |
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| 142 | 137 |
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| 167 | 65 |

An employer does not undertake, absolutely, with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care; and when injury to an employe results from a defect in the implements, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it.

Defendant, J. T. S., a painter, contracted to paint the inside of the dome of a court-house. Having no experience in building scaffolds, or knowledge of that business he made a contract with defendant J. S., an experienced scaffold-builder, to erect the necessary scaffolding, which was to be first-class. Through the negligence of J. S., the scaffold was defectively constructed, and, in consequence, while D., plaintiff's intestate, who was in the employ of J. T. S., was at work upon the scaffold, it gave way, and D. received injuries causing his death. In an action to recover damages, it did not appear that J. T. S. knew, or had reason to know, of any defect in the scaffold. *Held*, that J. S. was not the agent, or servant, of J. T. S., but an independent contractor, for whose acts, or omissions, the latter was not liable; that it was not negligence for him to rely upon the judgment of J. S. as to the sufficiency of the scaffold, and the propriety of the mode of construction; and that, therefore, J. T. S. was not liable. But *held* (EARL, J., dissenting) that J. S. was liable, as, although there was no privity of contract between him and D., he had contracted to build a structure for the workmen of J. T. S., any defect wherein, which would cause it to give way, would naturally result in injury to said workmen, and he owed them a duty to use proper diligence, independent of his contract.

This was the opinion of the court
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Mayor v. Cunliff (2 N. Y. 165), *Loop v. Litchfield* (42 id. 351), *Losee v. Clute*, (51 id. 494), distinguished

Devlin v. Smith (25 Hun, 206), reversed in part.

(Argued February 10, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 12, 1881, which affirmed a judgment entered upon an order dismissing plaintiff's complaint on trial. (Reported below, 25 Hun, 206.)

This action was brought to recover damages for alleged negligence, causing the death of Hugh Devlin, plaintiff's intestate.

Defendant Smith entered into a contract with the supervisors of the county of Kings, by which he agreed to paint the inside of the dome of the court-house in that county.

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Smith was not a scaffold-builder, and knew nothing of that business. He entered into a contract with defendant Stephenson, who was an experienced scaffold-builder, and had been previously employed by Smith, to build the necessary scaffold. This was to be of the best materials, and first-class in every way. Stevenson built the scaffold of poles, in sections. To the poles used for uprights, horizontal poles were lashed with ropes; these were called ledgers. Upon these ledgers, plank were placed, and upon the top of each section so constructed, was placed another similarly constructed. When the scaffolding reached the curve of the dome, it was necessary to lessen the width of the upper section. For this purpose a strip of plank was used as an upright to support the end of the shorter ledger. This upright was called a cripple; but instead of fastening the ledger to it by lashing it was fastened by nailing. The scaffold was ninety feet in height.

Devlin was a workman in Smith's employ. He was working on the curve of the dome, and sitting on a plank laid upon a ledger which was nailed to an upright or cripple, as above described, when the ledger gave way and broke. He was precipitated to the floor below, and so injured that he died soon after.

Thomas E. Pearsall for appellant. It was the duty of the defendant Smith to furnish for the use of his servants proper, suitable, safe and sufficient machinery, means and appliances, and keep them in safe and suitable condition. (*Corcoran v. Holbrook*, 59 N. Y. 517; *Laning v. New York Cent. R. R.*, 49 id. 532; *Booth v. B. & A. R. R.*, 73 id. 38; *Wright v. New York Cent. R. R.*, 25 id. 562; *Flike v. B. & A. R. R.*, 53 id. 549, 553; *Cone v. D. & L. W. R. R.*, 81 id. 206, 208; *Brickner v. New York Cent. R. R.*, 2 Lans. 506; affirmed, 49 N. Y. 672; *Kain v. Smith*, 80 id. 468; *Crispin v. Babbitt*, 81 id. 521; *Fuller v. Jewett*, 80 id. 46, 51.) It is not necessary to show that the defendant Smith had actual knowledge or notice of the defect in the scaffold. It is sufficient that he ought to have known, or could, by the exercise of reasonable care, have ascertained, its defective condition. (*Wright v.*

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N. Y. C. R. R., 25 N. Y. 562-566; *Brickner v. N. Y. C. R. R.*, 2 Lans. 506-513; affirmed, 49 N. Y. 672; *Fuller v. Jewett*, 80 id. 46; *Booth v. B. & A. R. R.*, 73 id. 38; *Flike v. N. Y. C. R. R.*, 53 id. 549; *Spelman v. Fisher Iron Co.*, 56 Barb. 151, 165; *Connolly v. Poillon*, 41 id. 366; affirmed, 41 N. Y. 619; *Ryan v. Fowler*, 24 id. 410, 414; *Gibson v. Pacific R. R.*, 2 Am. Rep. 497, 503; *Noyes v. Smith*, 28 Vt. 59; *Chicago, etc., R. R. v. Platt*, 89 Ill. 141; *Wedgewood v. C. & N. W. R. R.*, 44 Wis. 2; *Holmes v. Clark*, 10 W. R. 405.) The defendant Stevenson was liable on the ground of a neglect or disregard of a public duty or obligation. (*Thomas v. Winchester*, 6 N. Y. 396; *Cook v. N. Y. Floating Dock Co.*, 1 Hilt. 436; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Godley v. Haggerty*, 20 Penn. St. 387; *Fort v. Whipple*, 11 Hun, 586.) It is a matter of right in the plaintiff to have the issue of negligence submitted to the jury when it depends on conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. (*Payne v. T. & B. R. R.*, 83 N. Y. 574; *Wolfkiel v. Sixth Ave. R. R.*, 38 id. 49; *Weber v. N. Y. C. R. R.*, 58 id. 451; *Hart v. H. R. Bridge Co.*, 80 id. 622; *Colt v. Sixth Ave. R. R.*, 49 id. 671; *Painton v. N. C. R. R.*, 83 id. 7-14; *Fort v. Whipple*, 11 Hun, 586-590, 591-593.) The question of contributory negligence on the part of the deceased was a question of fact for the jury. (*Weber v. N. Y. C. R. R.*, 58 N. Y. 451; *Thurber v. Harlem R. R.*, 60 id. 330, 331; *Hawley v. N. C. R. R.*, 82 id. 370; *Belton v. Baxter*, 58 id. 411.) The deceased had the right to assume that the defendant Smith exercised due care and diligence in providing the scaffold, and that it was a safe and suitable structure to work upon (*Connolly v. Poillon*, 41 Barb. 366-369; affirmed, 41 N. Y. 619; *Noyes v. Smith*, 28 Vt. 59; 24 N. Y. 414; *Jetter v. N. Y. & H. R. R.*, 2 Abb. Ct. App. Dec. 458, 461; *Ford v. Fitchburg R. R.*, 14 Am. Rep. 606; *Gibson v. Pacific R. R.*, 2 id. 500; *Fort Wayne R. R. v. Gildersleeve*, 33 Mich. 133; *Toledo R. R.*

Statement of case.

Co. v. Ingraham, 77 Ill. 309 ; *Laning v. N. Y. C. R. R.*, 49 N. Y. 521, 531.)

Winchester Britton for respondents. It is the duty of the plaintiff to prove, and the right of the defendant, who is charged with negligence causing an injury, that he should prove by satisfactory evidence, that he did not contribute to the injury by any negligence on his own part. (*Warner v. N. Y. C.*, 44 N. Y. 465 ; *Cordell v. Central Road*, 75 id. 332.) As plaintiff knew the perils of the service and consented to continue in it, he has no claim upon his employer in respect to injuries resulting from these perils. (*Wright v. Central Road*, 25 N. Y. 652-70 ; *Owen v. Central Road*, 1 Lans. 108 ; *Haskins v. N. Y. C. & H. R. R. Co.*, 65 Barb. 129.) If the risks were open and visible, he was bound to take notice of them. (Wood's Master and Servant, § 326 ; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282 ; *Priestly v. Fowler*, 3 M. & W. 1 ; *Potts v. Plunkett*, 9 Jur. C. L. 290 ; *Ogden v. Summers*, 3 Cl. & F. 751 ; *Riceman v. Havemeyer*, 84 N. Y. 647 ; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 ; *Loonon v. Brockway*, 3 Robt. 74.) So far as the defendant Smith is concerned, assuming the accident to have been due to the fact that the upright was nailed instead of being lashed, the case fails to show that he "omitted any duty which makes him responsible to the plaintiff." (*Henry v. S. I. R. R. Co.*, 81 N. Y. 373 ; *De Graff v. N. Y. C. R. R.*, 76 id. 125 ; *Fuller v. Jewett*, 80 id. 46 ; *Coughtry v. Woolen Co.*, 56 id. 124.) He was bound to exercise an ordinary and reasonable degree of care and diligence in furnishing a scaffold for his men to work on. (*Bissell v. N. Y. & H. R. R. Co.*, 70 N. Y. 171 ; *Md. R. R. Co. v. Barber*, 5 Ohio St. 541 ; *Gibson v. R. R. Co.*, 2 Am. Rep. 497 ; *Hard v. R. R. Co.*, 32 Vt. 473.) There was no privity between Stephenson and Smith's employes ; he owed them no duty, and he cannot be held liable for any accident happening after he had finished the scaffold and Smith had assumed control of it. (*Losee v. Clute*, 51 N. Y. 494 ; *Loop v. Litchfield*, 42 id. 351 ; *Coughtry v. Globe Woolen Co.*,

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56 id. 124; *Longmeid v. Holliday*, 6 Eng. Law & Eq. 362; *Mayor v. Cunliff*, 2 N. Y. 165; *Burke v. De Castro*, 11 Hun, 355; *Thomas v. Winchester*, 6 N. Y. 397.)

RAPALLO, J. Upon a careful review of all the testimony in this case, we are of opinion that there was sufficient evidence to require the submission to the jury of the question, whether the breaking down of the scaffold was attributable to negligence in its construction. It appears that the ledger which supported the plank upon which the deceased was sitting broke down without any excessive weight being put upon it, and without any apparent cause sufficient to break a well-constructed scaffold. One witness on the part of the plaintiff, accustomed to work on scaffolds and to see them built, testified that the upright which supported the end of the ledger should have been fastened to it by lashing with ropes, instead of by nailing, and that lashing would have made it stronger, giving as reasons for this opinion, that the springing of the planks when walked upon was liable to break nails or push them out, whereas lashings would only become tighter, and the witness testified that the kind of scaffold in question was generally fastened by lashing, and that it was not the proper way to support the end of the ledger which broke, with an upright nailed to the ledger, and that the ledger in question was fastened by nailing.

Another, a carpenter and builder, testified, that when, on account of the curving of a dome, it became necessary to put in a cripple, the cripple as well as the main uprights should be tied to the ledgers with rope; that the springing of the scaffold will break nails.

The appearances after the breakage were described to the jury, and a model of the scaffold was exhibited to them. Testimony touching the same points was submitted on the part of the defendants, and we think that on the whole evidence it was a question of fact for the jury, and not of law for the court, whether or not the injury was the result of the negligent construction of the scaffold.

The question of contributory negligence on the part of the deceased was also one for the jury. They had before them the

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circumstances of the accident. It appeared that the deceased was sitting on a plank, performing the work for which the scaffold had been erected. He was washing the interior wall of the dome, preparatory to its being painted. There was nothing to indicate that he was in an improper place, or that he unnecessarily exposed himself to danger, or did any act to contribute to the accident. It is suggested that he, or some of his fellow-servants, may have kicked against the upright or brace which supported the end of the ledger, and thus thrown it out of place, but there was no evidence which would entitle the court to assume that the accident occurred from any such cause. The case was, therefore, one in which the jury might have found from the evidence that the death was caused by the improper or negligent construction of the scaffold, and without any fault on the part of the deceased, and the remaining question is, whether, if those facts should be found, the defendants, or either of them, should be held liable in this action.

The defendant Smith claims that no negligence on his part was shown. He was a painter who had made a contract with the supervisors of Kings county to paint the interior of the dome of the county court-house, and the deceased was a workman employed by him upon that work. As between Smith and the county, he was bound to furnish the necessary scaffolding; but he was not a scaffold-builder, nor had he any knowledge of the business of building scaffolds, or any experience therein. He did not undertake to build the scaffold in question himself, or by means of servants or workmen under his direction, but made a contract with the defendant Stevenson to erect the structure for a gross sum, and the work was done under that contract, by Stevenson, who employed his own workmen and superintended the job himself. Mr. Stevenson had been known to Smith as a scaffold-builder since 1844. His experience had been very large, and Smith had employed him before, and on this occasion the contract with him was for a first-class scaffold. There is no evidence upon which to base any allegation of incompetency on the part of Stevenson, nor any charge of negligence on the part of Smith in selecting him as contractor, nor

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is there any evidence that Smith knew, or had reason to know, of any defect in the scaffold.

An employer does not undertake absolutely with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect, and where injury to an employe results from a defect in the implements furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. Personal negligence is the gist of the action. (*Wright v. New York Central R. R. Co.*, 25 N.Y. 566; *Warner v. Erie Railway Co.*, 39 id. 468, 475; *Wilson v. Merry*, L. R., 1 Scotch & Div. App. 326; *Fuller v. Jewett*, 80 N. Y. 46; 36 Am. Rep. 575.)

Under the recent decisions in this State, it may be that if Smith had undertaken to erect the scaffold through agents, or workmen acting under his direction, he would have been liable for negligence on their part in doing the work, provided that in doing it they were not fellow-servants of the party injured. But in this case he did not so undertake. Stevenson was not the agent or servant of Smith, but an independent contractor for whose acts or omissions Smith was not liable. (*Blake v. Ferris*, 5 N. Y. 48.) Smith received the scaffold from him as a completed work, and we do not think that it was negligence to rely upon its sufficiency and permit his employes to go upon it for the purpose of performing their work. Stevenson was, as appears from the evidence, much more competent than Smith to judge of its sufficiency. He had undertaken to construct a first-class scaffold, and had delivered it to Smith in performance of this contract, and we do not think that Smith is chargeable with negligence for accepting it without further examination. All that such an examination would have disclosed would have been that the upright was nailed to the ledger, and Smith, not being an expert, would have been justified in relying upon the judgment of Stevenson as to the propriety of that mode of fastening. The defect was not such as to admonish Smith of danger.

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If any person was at fault in the matter it was the defendant Stevenson. It is contended, however, that even if through his negligence the scaffold was defective, he is not liable in this action because there was no privity between him and the deceased, and he owed no duty to the deceased, his obligation and duty being only to Smith, with whom he contracted.

As a general rule the builder of a structure for another party, under a contract with him, or one who sells an article of his own manufacture, is not liable to an action by a third party who uses the same with the consent of the owner or purchaser, for injuries resulting from a defect therein, caused by negligence. The liability of the builder or manufacturer for such defects is, in general, only to the person with whom he contracted. But, notwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use. As where a dealer in drugs carelessly labeled a deadly poison as a harmless medicine, it was held that he was liable not merely to the person to whom he sold it, but to the person who ultimately used it, though it had passed through many hands. This liability was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others. (*Thomas v. Winchester*, 6 N. Y. 397.) In that case *Mayor, etc., v. Cunliff* (2 N. Y. 165) was cited as an authority for the position that a builder is liable only to the party for whom he builds. Some of the examples there put by way of illustration were commented upon, and among others the case of one who builds a carriage carelessly and of defective materials, and sells it, and the purchaser lends it to a friend, and the carriage, by reason of its original defect, breaks down and the friend is injured, and the question is put, can he recover against the maker? The comments of RUGGLES, Ch. J., upon this supposititious case, in *Thomas v. Winchester*, and the ground upon which he answers the question in the negative, show clearly the distinction be-

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tween the two classes of cases. He says that in the case supposed, the obligation of the maker to build faithfully arises only out of his contract with the purchaser. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life.

Applying these tests to the question now before us, the solution is not difficult. Stevenson undertook to build a scaffold ninety feet in height, for the express purpose of enabling the workmen of Smith to stand upon it to paint the interior of the dome. Any defect or negligence in its construction, which should cause it to give way, would naturally result in these men being precipitated from that great height. A stronger case where misfortune to third persons not parties to the contract would be a natural and necessary consequence of the builder's negligence, can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life. These circumstances seem to us to bring the case fairly within the principle of *Thomas v. Winchester*.

The same principle was recognized in *Coughtry v. The Globe Woolen Co.* (56 N. Y. 124,) and applied to the case of a scaffold. It is true there was in that case the additional fact that the scaffold was erected by the defendant upon its own premises, but the case did not depend wholly upon that point. The scaffold was erected under a contract between the defendant and the employers of the person killed. The deceased was not a party to that contract, and the same argument was made as is urged here on the part of the defendant, that the latter owed no duty to the deceased; but this court held that in view of the facts that the scaffold was upwards of fifty feet from the ground, and unless properly constructed was a most dangerous trap, imperiling the life of any person who might go upon it, and that it was erected for the very purpose of accommodating the workmen, of whom the person killed was one, there was a duty toward them resting upon

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the defendant, independent of the contract under which the structure was built, to use proper diligence in its construction. The additional fact that the structure was on the premises of the defendant was relied upon, but we think that, even in the absence of that feature, the liability can rest upon the principle of *Thomas v. Winchester*.

Loop v. Litchfield (42 N. Y. 351; 1 Am. Rep. 543) was decided upon the ground that the wheel which caused the injury was not in itself a dangerous instrument, and that the injury was not a natural consequence of the defect, or one reasonably to be anticipated. *Losee v. Clute* (51 N. Y. 494; 10 Am. Rep. 638) was distinguished from *Thomas v. Winchester*, upon the authority of *Loop v. Litchfield*.

We think there should be a new trial as to the defendant Stevenson, and that it will be for the jury to determine whether the death of the plaintiff's intestate was caused by negligence on the part of Stevenson in the construction of the scaffold.

The judgment should be affirmed, with costs, as to the defendant Smith, and reversed as to the defendant Stevenson, and a new trial ordered as to him, costs to abide the event.

ANDREWS, Ch. J., DANFORTH and FINCH, JJ., concur; EARL, J., concurs as to defendant Smith, and dissents as to defendant Stevenson. MILLER, J., absent; TRACY, J., not sitting.

Judgment accordingly.

GEORGE W. RIGGS et al., as Executors, etc., Appellants, v.
SAMUEL W. CRAGG, as Administrator, etc., Respondent.

GEORGE W. RIGGS et al., as Trustees, etc., Appellants, v. Same
Respondent.

A Surrogate's Court can only exercise the powers prescribed by statute, and such incidental powers as are requisite to the exercise of the powers expressly given, or to the attainment of justice in the cases to which its jurisdiction extends. Unless a warrant for the exercise of jurisdiction in

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a particular case can be found in the statute, either given expressly or by implication, the whole proceedings are void.

In proceedings under the statute (2 R. S. 220, § 1), for a special accounting of an executor, at the instance of a legatee, to enforce the payment of a legacy, the surrogate has only jurisdiction to decree payment where the legacy is undisputed. When upon such an application the surrogate can see that other persons may claim, and a real question is presented as to the right of one of several persons to the legacy or fund, he may not proceed to a determination without the presence of all the parties who may be affected by the adjudication, these can only be brought in upon a final accounting, and only in that proceeding has the surrogate jurisdiction to settle and adjust conflicting rights and interests.

It seems that a surrogate has jurisdiction to pass upon the construction of a will, where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made.

Bevan v. Cooper (72 N. Y. 317), distinguished.

Riggs v. Cragg (26 Hun, 90), reversed.

(Argued April 17, 1882; decided October 10, 1882.)

THESE are appeals from two judgments of the General Term of the Supreme Court, in the first judicial department, entered upon orders which affirmed decrees of the surrogate of the county of New York; one made upon settlement of the accounts of the executors of the will of Elisha Riggs, deceased; the other settling the accounts of the same persons as trustees under said will. (Reported below, 26 Hun, 90.)

The material facts are stated in the opinion.

Austen G. Fox for appellants. The Surrogate's Court is an inferior court of limited jurisdiction, having only such jurisdiction as has been conferred upon it by statute. (*Bevan v. Cooper*, 72 N. Y. 317; *Stilwell v. Carpenter*, 59 id. 414; *McNulty v. Hurd*, 72 id. 518; *Roderigas v. East River Svcs. Instn.*, 76 id. 316; *Tucker v. Tucker*, 4 Keyes, 136; *Corwin v. Merritt*, 3 Barb. 341.) The jurisdiction to construe wills is part of the jurisdiction of the Court of Chancery, and is incident to its jurisdiction over trusts. (*Chipman v. Montgomery*, 63 N. Y. 221; *Bailey v. Briggs*, 56 id. 407; *Monarque v. Monarque*, 80 id. 320; 1 Wms. on Exrs. [6th Am. ed.] 339 [294]; *Gawler v. Standerwick*, 2 Cox's Eq. Cas. 15, 29; *Walsh v. Gladstone*, 13 Sim. 261, 264; *Hegarty's*

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Appeal, 75 Penn. St. 503, 516; 2 Story's Eq. Jur., § 1058.) No such jurisdiction has been conferred in terms upon the surrogate, and he cannot take it by implication for the jurisdiction of an inferior court is not to be extended by implication. (*Pierce v. Hopper*, 1 Stra. 249, 260; *Peacock v. Bell*, 1 Wms. Saund. 731; *James v. S. Wn. Ry. Co.*, L. R., 7 Exch. 287; *Simpson v. Blues*, L. R., 7 C. P. 290; *Smith v. Brown*, L. R., 6 Q. B. 729; *Jones v. Reed*, 1 Johns. Cas. 20; *Wells v. Newkirk*, id. 228; *People, ex rel. Gaskill, v. Ransom*, 56 Barb. 514; Potter's Dwaris Stat. Constr., 185; *Marston v. Paulding*, 10 Paige's Ch. 154; *Cooper v. Felter*, 6 Lans. 485; *Tucker v. Tucker*, 4 Keyes, 136; *Keteltas v. Green*, 9 Hun, 599; *Stilwell v. Carpenter*, 59 N. Y. 414; *McNulty v. Heard*, 72 id. 518; 2 R. S. 220, § 1, subd. 3; id. 98, §§ 32, 83; *Hayes v. Hayes*, 48 N. H. 219, 229; *Harrison v. Harrison*, 9 Ala. 470, 478; *Drane v. Beal*, 21 Ga. 21, 45; *Schull v. Murray*, 32 Md. 9, 16; *State v. Warren*, 28 id. 338, 355; 5 Statutes at Large [Edmonds' ed.], 671; Maxwell on Interpretation of Statutes, 321; 2 Story's Eq. Jur., § 1065; 2 R. S. 94, § 79.) If the surrogate had no jurisdiction to construe the will in this proceeding, then the question of the true construction of the will is not before the court on this appeal. (*Hurlburt v. Durant*, 88 N. Y. 121; *Willard's Appeal*, 65 Penn. St. 268; *Duryea v. Traphagen*, 84 N. Y. 652; *People v. Sturtevant*, 9 id. 263.)

Wm. G. Choate for respondent. The surrogate had jurisdiction, upon the accounting, to determine the right to the income of Mary Alice's share, which accrued and was unexpended during her minority, and to determine the question relating to stock dividends, and all other questions upon which he gave judgment by his decree. (2 R. S. 220, § 1 [6th ed.], vol. 3, p. 325; Laws of 1867, chap. 782; 3 R. S. [6th ed.] 106, § 100; 2 Laws of N. Y. [Jones & Varick's ed.] 71; 1 Webster's Laws, 317, 325; *Foster v. Wilber*, 1 Paige's Ch. 537; *Brick's Estate*, 15 Abb. Pr. 12; 3 R. S. [6th ed.] 104, § 86 [71]; *Magee v. Vedder*, 6 Barb. 352; *Wilson v. Baptist Ed. Soc. of*

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N. Y., 10 id. 308, 318.) Whenever a power is given by a statute, every thing necessary to the making of it effectual, or requisite to attain the end, is implied; and where the law requires a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. (1 Kent's Com. [12th ed.] 464; Sedgwick on Stat. and Const. Law, 92; *Livingston v. Harris*, 11 Wend. 329, 340; *Stief v. Hart*, 1 Comst. 20, 30; Redfield's Surrogates' Courts [2d ed.], 240, 241; *Sipperly v. Baucus*, 24 N. Y. 46, 49; *Seaman v. Duryea*, 11 id. 324, 328, 329; *Wood v. Brown*, 34 id. 337, 343; *Chipman v. Montgomery*, 63 id. 221, 235; *Stagg v. Jackson*, 1 id. 206; *N. Y. Inst. for the Blind v. How's Exrs.*, 10 id. 84; *Parsons v. Lyman*, 20 id. 103; *Mosely v. Marshall*, 22 id. 200; *McNaughton v. McNaughton*, 34 id. 201; *Bascom v. Alvertson*, id. 584; *Whitson v. Whitson*, 53 id. 479; *Cushman v. Horton*, 59 id. 149; *Hoppock v. Tucker*, id. 202; *Teed v. Morton*, 60 id. 502; *Van Vechten v. Keator*, 63 id. 52; *Lawrence v. Lindsay*, 68 id. 108; *Luce v. Dunham*, 69 id. 36; *Wheeler v. Ruthven*, 74 id. 428; *Ferrer v. Pyne*, 81 id. 281; *Leggett v. Leggett*, 24 Hun, 333.)

ANDREWS, Ch. J. The objection that the surrogate had no jurisdiction to render the decrees in question is, we think, well taken.

The proceedings were instituted by the filing of a petition before the surrogate of the county of New York, on the 7th day of June, 1870, by Samuel W. Cragg, administrator of Mary Alice Cragg, deceased, setting forth that Mary Alice Cragg was the daughter of Elisha Riggs, deceased, late of the city of New York, and beneficially interested in the estate of said Elisha Riggs, and in a trust created by his will; that the testator died August 3, 1853, and that his will was duly admitted to probate before the said surrogate, September 27, 1853; that on the same day letters testamentary were issued to George W. Riggs and Joseph K. Riggs, two of the executors named therein; that the testator left personal estate amounting to about \$900,000; that the executors were also by the will

appointed trustees of the trust created thereby ; that they have never rendered any account of their proceedings as executors, nor as trustees under the will, of the share of the testator's estate set apart for the benefit of his daughter Mary Alice, for life. The petition concludes with a prayer that an order may be issued, requiring the said George W. Riggs and Joseph K. Riggs to render an account of their proceedings as executors, and also as testamentary trustees and for general relief. The surrogate, upon presentation of the petition, issued a citation pursuant to the prayer of the petition, which was served on the executors. The executors appeared on the return of the citation and filed separate accounts as executors and trustees, viz.: an executors' account extending from August 3, 1853, to May, 1870, and two accounts as testamentary trustees, one extending from August 3, 1853, to June 29, 1860, and the other from the latter date to March 9, 1870. The proceedings finally resulted in two decrees made by the surrogate, February 24, 1881, settling the accounts of the executors and trustees with the estate of Mary Alice Cragg, and adjudging the balance due. By the decree on the executors' account, it was adjudged that there was due to the estate of Mary Alice Cragg the sum of \$50,578.06, which the executors were directed to pay to her administrator. The account of the executors as testamentary trustees was settled and allowed at \$120,104.44, which sum was adjudged to be the balance in the hands of the trustees to the credit of the estate of Mary Alice Cragg, and which sum, less costs and expenses, was also decreed to be paid by the trustees to her administrator, and in addition the trustees were directed to transfer and deliver to him sixty-six shares of the capital stock of the New York Gas-light Company, and the amount of certain dividends thereon. The decree of the surrogate was affirmed by the General Term.

For a proper understanding of the jurisdictional question, it is necessary to refer to certain facts disclosed by the record. The testator, Elisha Riggs, died August 3, 1853, leaving a widow and six children, five sons and one daughter, surviving. Two of his children, William H. Riggs and Mary Alice Riggs,

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were then minors, the latter having been born June 29, 1839. His will was dated May 17, 1844, to which a codicil was added June 7, 1851. The testator at the time of his death was possessed of a large personal estate and also owned real property, the amount of which does not appear. The will was duly proved, and letters testamentary were issued thereon to George W. Riggs and Joseph K. Riggs, who qualified as executors and who also accepted the trust for the benefit of Mary Alice Cragg created by the will, and have since managed the estate. The testator, by his will, after directing the payment of his debts, and providing for the widow, and making certain bequests, provides, in the *ninth* clause, as follows: "*Ninth*.—All the rest, residue and remainder of my property and estate, both real and personal, etc., I hereby give, devise and bequeath to my six beloved children (naming them), and to their respective heirs, executors, administrators or assigns, in equal portions, or share and share alike, except the portion or share of my said daughter, Mary Alice Riggs, which I dispose of for her sole and separate use and benefit, whether married or unmarried, as follows, that is to say: I give, devise and bequeath the same to my executors hereinafter named, in trust, for her separate use and benefit, during her natural life, to invest and improve the same at their best discretion, and to pay to her, from and after her arrival at the age of twenty-one years, or marriage, with the consent of her mother, if living, whichever event may first happen, into her own hands, whether married or unmarried, and upon her own separate receipt, to be given from time to time, and not by way of anticipation, the net interest, dividends, or other periodical income thereof; and at her decease, I hereby give, devise and bequeath the capital of her said share, or portion, to her issue, or other descendants, in equal portions, or share and share alike, etc.; and should my said daughter not marry, or marry, and have no issue that shall survive her, and should she survive her husband, then, upon her decease, I hereby give, devise and bequeath her share and portion of my residuary estate, both real and personal, to her surviving brothers, and their issue,

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share and share alike, except that the issue of any deceased brother are to take by representation." The ninth clause further provides that, in case his daughter should marry, and should die, leaving no issue, but leaving her husband surviving, he should receive an annuity of \$1,000, etc. By the tenth clause, the executors are authorized to make advances, from time to time, for the support, maintenance and education of his minor children, during their minorities, not exceeding \$800 a year, and they are directed to keep a separate account with each child, charging him, or her, with such advances.

Mary Alice Cragg became of age, June 29, 1860. She was married to the petitioner, Samuel W. Cragg, in 1869, and died March 9, 1870, intestate, and without issue, and the petitioner was duly appointed administrator of her estate. It seems, from what can be gathered from the record, although there is no distinct proof upon the subject, that the executors, from time to time, after the death of the testator, set off portions of the estate to the credit of the trust, but retained a portion of the share of the testator's daughter, as an undivided interest. The surrogate, in stating the executor's account, ascertained, in the first place, the whole income received by the executors, as such, from the death of the testator, in 1853, to the death of Mrs. Cragg, in 1870, and awarded to her one-sixth of the net income for that period, deducting such payments as were properly chargeable to her. In stating the trustees' account, he charged the executors with the whole income of the trust estate during the same period, and ascertained the balance by deducting therefrom the sums properly chargeable to her, as in the other case. Both accounts are largely made up of income on the one-sixth share of the estate given to Mary Alice for life, which accrued between August 3, 1853, the date of the testator's death, and June 29, 1860, the day on which she reached her majority, and interest thereon. The testator, at the time of his death, owned stock in various railroad, and other corporations, upon which, after his death, stock dividends were declared, from time to time, which were received by the executors and trustees, and credited to capital, and not to

income, amounting, in the aggregate, to a large sum. The surrogate, in making up the accounts, held that the stock dividends were, as between the life-tenant and the remainderman, income, and not capital, and were to be credited as income in the accountings.

The citation, as has been said, by which the proceeding was initiated, was a citation to the executors only. The residuary legatees, other than the executors, have not been brought in, and they were in no way made parties to the proceeding, or to the decrees of the surrogate. So far as appears, they were neither served with process, nor did they appear, or take any part, in the litigation. Several interesting and important questions, involved in the determination of the surrogate, have been presented upon the appeal, and argued with great ability by the respective counsel. One of these questions respects the right, as between life-tenant and remainderman, to the income on the share of Mary Alice Riggs, under the will of her father, which accrued during her minority. It is claimed, on the part of the respondent, that by the true construction of the will, the income of her share which accrued during her minority, beyond the sum directed to be paid for her support and maintenance, was to be accumulated, and to be paid to her on arriving at the age of twenty-one years; and that this construction is necessary to effectuate the intention of the testator to give to his daughter the "use and benefit" of the equal one-sixth part of the estate during her life; and other provisions of the will, not herein referred to, are relied upon as confirming this construction. On the other hand it is claimed by the executors, that the share of the daughter, having been vested in the trustees upon the trust to "invest and improve" the same, and to pay to her "from and after" her arrival at majority, the "net interest, dividends or other periodical income thereof," it was the intention of the testator that the share should be augmented by adding the surplus income accruing during the daughter's minority, to the capital of the share, and to give to her the income only after that time accruing from the original capital of the share and the additions, and that it is only by this construction that

effect can be given to the directions of the testator to the trustees to improve the share given in trust.

When the construction of the will is settled, a further question may arise as to the validity of the trust as a trust for accumulation, and if void, whether the surplus income goes to the daughter or to the remainderman, as persons entitled to the next eventual estate in the fund.

Another important question involved in the decision of the surrogate, relates to the distribution as between capital and income of stock dividends, declared and received by the executors and trustees during the existence of the life-tenancy. Are stock dividends, representing earnings and profits of a corporation, expended in construction or improvements of the corporate property, declared during the life-tenancy, to be regarded as between the life-tenant and remainderman, as accretions to the capital, or as income? If declared out of accumulated profits earned before the inception of the life-tenancy, are they capital or income as between these two interests? If they represent earnings made partly before and partly during the life-tenancy are they apportionable? The right to stock dividends as between tenant for life and remainderman, has not been considered by the court of last resort in this State. The decisions upon the subject in other States and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates.

The surrogate decided that surplus income of the share of the testator's estate given to his daughter for life, which accrued during her minority, was not, by the true construction of the will, to be regarded as an accretion to the capital, but was income, payable to the tenant for life on her reaching her majority, and he also decided that stock dividends declared during the life-tenancy belong to the life-tenant and not to the remainderman. It is obvious that the five sons of the testator, who, in the event which has happened, are entitled as

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remaindermen to the share given to his daughter for life, are interested in the determination of these questions. They were adjudicated by the surrogate in favor of the daughter's personal representative, in a proceeding between him and the executors exclusively, without bringing in three of the sons of the testator, or giving them an opportunity to be heard. The decrees require the executors and trustees to pay over the fund to the petitioner, and when executed, the fund will pass beyond the control of the court into his possession. It is plain, we think, that if, instead of resorting to the Surrogate's Court, the petitioner had filed a bill in equity for the same relief, the court would not have proceeded to a decree in the case until all the parties interested in the questions, had by amendment or other appropriate proceeding, been brought in and made parties to the action. For it is a general rule of courts of equity that all persons materially interested in the object of the suit must be joined, so that there may be a complete and final determination of the controversy. (1 Dan. Ch. Pl. 190; Story's Eq. Pl., § 99.) There are exceptions to the rule, where its enforcement would cause great practical inconvenience, or where the interests of persons, not parties, are deemed to be protected by representation. Of the latter class is the case of a bill filed by a single creditor or legatee, against an executor or administrator, for the satisfaction of his single debt or legacy, without joining the other creditors or legatees, or the next of kin, although the allowance of the particular debt or legacy may diminish the fund in which they are interested. But if special facts exist, which render the actual joinder of all the persons interested proper, as where there is a deficiency of assets, the bill must make all the persons so interested parties, either as plaintiffs or defendants, or where their rights are identical or not inconsistent, it must be filed in behalf of the plaintiff and all others in the same relative situation. (Story's Eq. Pl., § 140; *Brown v. Ricketts*, 3 Johns. Ch. 553; *Hallett v. Hallett*, 2 Paige, 15; *Egberts v. Wood*, 3 id. 517.) And in actions against trustees in respect to the trust property or for an accounting, and the administration of the trust estate, all

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the *cestuis que trust* or beneficiaries are necessary parties. (Story's Eq. Pl., § 207; *Holland v. Baker*, 3 Hare, 69; *Wake-man v. Grover*, 4 Paige, 23.) The principle that persons not actually parties to a suit in equity may nevertheless be bound by the decree, on the theory of representation, has, however, no proper application to a case like this. The personal representatives of the daughter and the sons of the testator have a common interest in the accounting by the executors and trustees, and conflicting interests in the distribution. Their interest in the taking of the accounts is hostile to the executors and trustees, and it will be a violation of equitable principles to permit executors having an adverse interest to represent parties not before the court. The interest, moreover, of the absent parties is not indirect and consequential, but immediate and direct.

The proceeding in question was not an action in equity, but a proceeding before a Surrogate's Court, a tribunal of peculiar and limited jurisdiction, which can exercise only the powers prescribed by the statute and such incidental powers as are requisite to the execution of the powers expressly given, or to the attainment of justice in the particular cases to which its jurisdiction extends. (*Sipperly v. Baucus*, 24 N. Y. 46; *Stilwell v. Carpenter*, 59 id. 414; *Bevan v. Cooper*, 72 id. 317.) Unless a warrant for the jurisdiction exercised by the surrogate in the case can be found in the statute, either expressly or by implication, the whole proceedings are void. By the general statute defining the powers of Surrogates' Courts, power is conferred upon surrogates among other things to direct and control the conduct and settle the accounts of executors, and to enforce the payment of debts and legacies (2 R. S. 220, § 1), and the powers so conferred are to be exercised in the cases and in the manner prescribed by the statutes of the State. (Id.) By chapter 782, Laws of 1867, a new power was conferred to compel testamentary trustees to render accounts of their proceedings in the same manner as executors and administrators. On referring to the particular provisions of the statute regulating the subject of accounting by executors before the surrogate, it will be seen that two modes of accounting are

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provided for. One is had at the instance of a particular creditor or legatee, upon a citation served on the executor, which may be followed by a decree for the payment of the particular debt or legacy, of the party instituting the proceeding. (2 R. S. 92, § 52; id. 116, § 18; *Guild v. Peck*, 11 Paige, 475.) The other is what is known as the rendering of a final account, which may be had at the instance of the executor, upon a citation requiring the creditors, legatees and (in case of intestacy) the next of kin of the decedent, to appear and to attend the settlement of the account, which must be served on all persons to whom it is directed, or the accounting may be had upon the order of the surrogate, upon his own motion and without the application of an interested party. (2 R. S. 92, §§ 52, 60, 61; *Smith v. Lawrence*, 11 Paige, 206.) When the account shall be rendered and finally settled, the surrogate is authorized to make a decree for the payment and distribution of the estate remaining in the hands of the executors, to and among the creditors, legatees, widow and next of kin of the deceased according to their respective rights, and in such decree he shall (the statute declares) "settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be payable, and the sum to be paid to each person." (2 R. S. 95, § 71.) The proceeding in this case was a proceeding for a special accounting in the first mode referred to. The executors had never rendered an account, and it was not turned into a final accounting, either upon their application or by the order of the surrogate. Such questions, therefore, only, could be determined by the surrogate, as were appropriate to the limited and special nature of the proceeding. The provision authorizing the surrogate to compel an accounting and the payment of a debt or legacy, upon the application of a particular creditor or legatee, cannot, we think, be construed as authorizing a decree of payment, except where the right to the debt or legacy, is undisputed. Other legatees, or creditors, may incidentally be affected by a decree for the payment of a particular debt or legacy, as such payment would reduce the fund in the hands of

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the executors or administrators, but this interest is indirect and consequential, and they are bound upon the theory of representation. But when the proceeding is by a creditor to compel the payment of a debt, and the debt is not admitted, and is disputed, the surrogate has no power to adjudicate it. He must await the ascertainment of the debt, by judgment, or upon a reference in the manner pointed out by the statute. This was decided in *Tucker v. Tucker* (4 Keyes, 136). This decision was based in part upon the special provisions of the statute relating to disputed claims, and applies as well to a provisional as to a final accounting. The statute does not in terms preclude the surrogate from decreeing the payment of a disputed legacy upon the application of one party upon a provisional accounting when the other parties interested are not before him, but the inhibition is we think necessarily implied. When the surrogate, upon such an application, can see that other persons claim or may claim the same thing as the petitioner, and that a real question is presented as to the right of one of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest on the final accounting, and in that proceeding, jurisdiction is conferred to settle and adjust conflicting rights and interests, while no such authority is conferred in the special proceeding in favor of a single creditor or legatee, and such authority was not, we think, intended to be given. It is no sufficient answer that the absent parties will not be bound by the decree. The fund in the hands of the executor is a trust fund, and in this case the fund in controversy was held under a formal trust. A court of equity would not permit it to be paid over without giving all the parties interested in the determination of the question, an opportunity to be heard. The surrogate cannot award it to one, and leave the others, who have not been summoned, to a doubtful remedy against the trustees, or to follow the fund into the hands of the personal representative of Mrs. Cragg.

The question of the jurisdiction of the surrogate to pass upon

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the construction of a will, has been much argued in this case. In support of the objection to this jurisdiction, the case of *Bevan v. Cooper* (72 N. Y. 317), is relied upon, in which the point decided was that a surrogate had no jurisdiction to determine the question whether certain legacies given by the will in that case, were charged upon real estate. The question was not, so far as appears, involved in the accounting, and was not necessary to be determined by the surrogate as incident to the accounting or distribution. The surrogate could not enforce the payment of the legacies out of the land, and as was said in the opinion, his decree adjudging the lien claimed would be *brutum fulmen*. It is doubtless true that a surrogate has no general jurisdiction in the construction of wills. But where the right to a legacy depends upon a question of construction, which must be determined before a decree for distribution can be made, the surrogate has, we think, jurisdiction under the broad grant of power conferred by section 71, upon a final accounting where all parties interested are before the court, to determine such construction as incident to the authority to make distribution. There are many cases in this court, on appeals from the decisions of surrogates on final accountings, which involved the interpretation and construction of wills, and no question was made by counsel, or suggested by the court, that the surrogate had no power to construe a will when necessary to the accounting and distribution. (*Stagg v. Jackson*, 1 N. Y. 206; *N. Y. Institution, etc., v. How's Ex'rs*, 10 id. 84; *Parsons v. Lyman*, 20 id. 103; *McNaughton v. McNaughton*, 34 id. 201; *Bascom v. Albertson*, 34 id. 584; *Whitson v. Whitson*, 53 id. 479; *Cushman v. Horton*, 59 id. 149; *Hoppock v. Tucker*, id. 202; *Teed v. Morton*, 60 id. 502; *Lawrence v. Lindsay*, 68 id. 108; *Luce v. Dunham*, 69 id. 36; *Wheeler v. Ruthven*, 74 id. 428; 30 Am. Rep. 315; *Ferrer v. Pyne*, 81 N. Y. 281.)

But for the reason that the jurisdiction of the surrogate is limited and special, and that he could not in the proceeding under review, determine the question as to the right to the fund in controversy, the judgment below should be reversed. We regret that this conclusion prevents a final disposition of this already protracted litigation.

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Judgment of the General Term and decree of the surrogate reversed.

All concur.

Judgment reversed.

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| 127 | 594 |

THE POUGHKEEPSIE GAS COMPANY, Respondent, v. THE CITIZENS' GAS COMPANY, Appellant.

Plaintiff, at the request of E., laid a small main in the lands of the latter in front of a row of dwelling-houses, for the purpose of supplying them with gas. It was made large enough to supply another row of houses, which E. proposed to erect, and was connected with a large main running through a street. E. sold the houses and the owners contracted with defendant to supply their houses with gas. Whereupon defendant disconnected the small main from the large main in the street and connected it with its own main laid in the same street. *Held*, that an action to restrain defendant from so using said small main and to compel it to reconnect it with plaintiff's large main, was maintainable; that the action of defendant was a trespass upon plaintiff's property, and the character of the injury was such that an injunction was proper.

(Argued April 20, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made at the February term, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 20 Hun, 214.)

This action was brought to restrain defendant from using or interfering with a small gas main laid by plaintiff, which had been severed by defendant from a large gas main laid in a street, and to compel defendant to reconnect it.

The plaintiff and defendant are both gas manufacturing companies, organized under the Law of 1848, located at the city of Poughkeepsie, and authorized by the common council of that city to use its streets. The plaintiff commenced business in 1850, and the defendant in 1875. Prior to, and until, April 1, 1874, Harvey G. Eastman was the owner of certain real

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estate and premises in said city, known and commonly designated as "Eastman terrace," or "Terrace block." The east end of the block bounds on South avenue, the only public street contiguous to the premises, which is an extension of Market street. At the time of the agreement made between the plaintiff and Eastman, hereinafter referred to, the block consisted of ten lots, with a house erected on each. Beyond the houses, were certain other lots owned by Eastman, upon which he contemplated the erection of other buildings. Both the plaintiff and defendant laid gas-mains on Market street and South avenue. Prior to 1874, the plaintiff, at its own cost and expense, at the request of Eastman, laid a main three inches in diameter, from its main in South avenue, across that portion of South avenue which lay between its main and the premises of Eastman, extending in front of the houses on the Terrace block, and upon the premises of Eastman, for a distance of about two hundred and thirty-eight feet, for the purpose of supplying these houses with gas. It also laid surface pipes leading from the main into each of the houses in question, through which it served gas to two of the ten houses. It was found that the main, as laid, was larger than was necessary to serve the ten houses, and was thus laid at the request of Eastman, with a view of serving other houses that might thereafter be erected on the vacant lots lying beyond the houses in question. Subsequently, Eastman conveyed the premises in question to trustees, and the trustees and Eastman afterward conveyed the houses to several owners, by deed. The gas-pipe was not mentioned or referred to in any of said conveyances. In 1879, the occupants of these houses agreed and consented to take gas of the defendant's company, in the place and stead of plaintiff's gas, and to have the defendant supply their respective houses and premises with gas. The defendant entered upon South avenue and severed the connection of the gas-main leading from the plaintiff's large main, in South avenue, to, and in front of, the houses in Terrace block, and connected said main with its own main, on South avenue, and proposed to supply said houses and premises with gas. After

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the act complained of, the owner of the house on the block nearest to South avenue, applied to again take the gas of the plaintiff.

Matthew Hale for appellant. A mere trespass will not authorize the interference of a court of equity; unless the injury will be irreparable the court will leave the party to his remedy at law. (*Jerome v. Ross*, 7 Johns. Ch. 315; *Hart v. Mayor*, 3 Paige, 213; *S. C.* affirmed, 9 Wend. 571; *Akrill v. Selden*, 1 Barb. 316; High on Injunctions [2d ed.], § 697; *T. & B. R. R. Co. v. B. H. T. & W. R. R. Co.*, decided by Ct. of App., October, 1881.) There can be no pretense that the plaintiff had acquired any easement or right to supply the buildings on the terrace with gas. (Washburn on Easements, 6, 7; 1 R. S. 738, § 137; id. 766, § 1.) The main laid by plaintiff was a fixture. (*Murdock v. Gifford*, 18 N. Y. 28; *Potter v. Cornwell*, 41 id. 278, 295; *Voorhees v. McGinnes*, 48 id. 278, 284; *McRea v. Cent. N. Bk. of Troy*, 66 id. 489; *Walmsley v. Mills*, 7 C. B. [N. S.] 115; *Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 354; *Richardson v. Copeland*, 6 Gray, 536; *Sudbury v. Jones*, 8 Cush. 184; *Richtmyer v. Morss*, 4 Abb. App. Dec. 55.) The judgment cannot be sustained upon the ground that the plaintiff had an unrevoked license to use the pipe. A court of equity will never interfere in restraint of a trespass unless complainant's title is first established. The injury threatened must be to the inheritance. (High on Injunctions [2d ed.], §§ 698, 701, 850; *Hart v. Mayor*, 9 Wend. 572; *Olmstead v. Loomis*, 6 Barb. 152; Washburn on Easements, 5; *Wolfe v. Frost*, 4 Sandf. Ch. 72, 91; *Ex parte Coburn*, 1 Cow. 468.) A conveyance by Eastman of the *locus in quo* would be *per se* a revocation. (Washburn on Easements, 6; *Wallis v. Harrison*, 4 M. & W. 538; *Miller v. Auburn, etc., R. R. Co.*, 6 Hill, 61, 64.) While a license may be a good defense to an act of trespass for an act committed before the license was revoked, it will never justify an action of trespass by the licensee for an interference by the licensor or any person acting under his authority, or a bill in equity for an injunction

to restrain interference with such license. (*Wolfe v. Frost*, 4 Sandf. Ch. 72; *Selden v. D. & H. C. Co.*, 29 N. Y. 634, 639; *Fentiman v. Smith*, 4 East, 107; *Hewlins v. Shipman*, 5 B. & C. 221; *Cocker v. Cooper*, 1 C. M. & R. 418; *Bryan v. Whistler*, 5 B. & C. 288; *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. 380; *Ex parte Coburn*, 1 Cow. 570; *Babcock v. Utter*, 1 Abb. App. Dec. 27; *Phelps v. Nolan*, 72 N. Y. 39, 43; *Murdock v. P. Pk., etc., R. R. Co.*, 73 id. 579, 584; *Wiseman v. Lucksinger*, 84 id. 31.) The various owners of the houses on the terrace property became the owners of so much of the main as lay in their soil, subject only to an easement in favor of each other owner. (*Flint v. Bacon*, 13 Hun, 457; *Butterworth v. Crawford*, 46 N. Y. 349.)

Mr. Lowen for respondent. Eastman could not convey the premises and so deprive plaintiff of his rights under his license and agreement, as the present owners have never revoked such license, or authorized the defendant to take possession of the plaintiff's main. (*Flint v. Bacon*, 13 Hun, 457; *Nellis v. Munson*, 24 id. 577; *Curtis v. Ayrault*, 47 N. Y. 73; *Tompson v. Milks*, 21 id. 505.) A parol license to lay down the main was sufficient. (10 Barb. 496; 6 N. Y. 279; 22 id. 336; 15 Wend. 380; 13 Hun, 170; 6 Hill, 61.)

TRACY, J. We are of opinion that many of the questions which were pressed upon our attention upon the argument are not involved in this case, and cannot properly be determined upon this appeal. It may be, as argued by appellant's counsel, that the agreement between the plaintiff and Eastman amounts to nothing more than a license, revocable at his pleasure, or at the pleasure of his grantees; and that, notwithstanding the small main was laid upon his premises, and extended from such premises across a portion of South avenue, to the plaintiff's main, at his request, and upon his agreement that when laid, it should be, and remain, the property of the plaintiff, the plaintiff may now, by a simple revocation of such license, be deprived of the main and of the beneficial use thereof. And

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it may be that the owners of the premises can, if they choose, take up such main, or, allowing it to remain, convert it to their own use without making any compensation to plaintiff therefor. No such question is involved in this case. The main was not severed in front of any of the houses upon the terrace, but in the public street, where the plaintiff was unquestionably the owner of both mains.

The agreement alleged and proven between the defendant and the owners of the various houses on the block goes no further than an agreement to take gas of the defendant's company. Their consent that the defendant might use the main upon their premises, for the purpose of supplying them with gas, is neither alleged nor proven. Whatever may be the rights of the owners of the premises in regard to such gas-main, the defendant has not succeeded thereto, and is not at liberty to assert them. The defendant, for the purpose of supplying gas to the houses upon the terrace, instead of laying down a main of its own, entered upon South avenue, at a point leading from the plaintiff's main to the premises in question, severed its connections from said large main, and connected the small main with its own. This it had no right to do. Its act was a trespass upon the plaintiff's property, without justification or excuse. But it is urged, that, conceding that the act of the defendant was a trespass upon the property of the plaintiff, it does not follow that the defendant should be restrained from continuing the wrong by injunction; that the plaintiff's injury may be compensated for in damages. The general rule is, that where the injury is permanent in character, and the damages resulting therefrom continuous in their nature, and especially where, from the nature of the act and the injury suffered, it is impossible, or difficult, to ascertain and determine the extent of the injury which may flow from a continuance of the wrong, an injunction is the proper remedy.

For these reasons, we think the judgment of the General Term, affirming that of the Special Term, is correct, and should be affirmed.

All concur, except MILLER, J., absent.

Judgment affirmed.

Statement of case.

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| 108 | 412 |
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| 114 | 338 |
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| 126 | 673 |
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| 135 | 105 |

JOHN D. MAIRS et al., as Assignees, etc., Respondents, v. THE
MANHATTAN REAL ESTATE ASSOCIATION, Appellant.

The firm of W. & Co., plaintiff's assignors, occupied a store in the city of New York, having a cellar and sub-cellar, and also a vault under the sidewalk in front. Defendant erected a building on an adjoining lot, and constructed a vault under the sidewalk in front thereof. In so doing it took up the curb and gutter of the street, and excavated a space in the street extending about two feet outside of the curb, and left the space in front of the outer wall of the vault unfilled. It also excavated a space on the lot of W. & Co., between the wall of said vault and the wall of the vault of W. & Co., which did not come quite to the line of the lot; such excavation extended below the foundation of the latter wall; this space communicated with that left in the street. The grade of the street descended so that when the premises were in the ordinary condition the surface water flowed through the gutter in front of the store of W. & Co., and passed off through the gutter in front of defendant's premises. Defendant constructed a dam from the sidewalk in front of the store of W. & Co., which turned the water across the street into the gutter on the other side, but during a heavy rain the dam gave way and let the water into said excavation; thence it found its way under the foundation of and into the vault of W. & Co., and their sub-cellar, damaging goods therein. In an action to recover the damages, *held* that defendant was liable, and this without regard to any question of negligence; that it was no defense that the dam was built properly, and due care was taken on its part to protect the premises.

Conceding the rule that, as to the traveling public, an excavation in a street made by consent of the municipal authorities is not *per se* unlawful, and a nuisance, and that the person making the same is only liable for the omission of proper care, such rule does not apply when the excavation causes injury to adjoining land by collecting surface water or diverting it from its proper channel, and thus throwing it upon such land. A municipal corporation cannot delegate power to private individuals to be exercised for their own private benefit to do injury to the property of their neighbors, and relieve them from responsibility from the damages, or reduce their liability to such as may result from want of proper care.

Where one, in making improvements upon his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage irrespective of any question of care or negligence, and a license from the municipal authorities cannot affect the question of responsibility.

It was claimed by defendants that the water, or a portion thereof, which did the injury found its way through holes in the sidewall of the store of W. & Co. *Held* immaterial; that they were under no obligation to make their wall impervious to water wrongfully thrown upon their premises.

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| 161 | 296 |

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Also *held*, that interest was properly allowed as an item of damages. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim. *Held*, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied.

(Argued April 27, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 20, 1880, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Reported below, 15 J. & S. 31.)

This action was brought originally by the members of the firm of F. S. Weeks & Co. to recover damages to their stock of goods occasioned by the alleged wrongful acts of the defendant. After the commencement of the action said firm became bankrupts, and the present plaintiffs, as assignees in bankruptcy, were substituted as plaintiffs.

The material facts are stated in the opinion.

Wheeler H. Peckham for appellant. Unless defendants were guilty of some neglect or some invasion of their neighbor's property, they are not responsible for any consequences to him of their acts. (*Hays v. The Cohoes Co.*, 2 Comst. 159; *Auburn Plank-road Co. v. Douglass*, 9 N. Y. 444; *La Sala v. Holbrook*, 4 Paige, 169.)

W. Howard Wait for respondents. The defendants were trespassers, and as such are liable for the consequences of their acts irrespective of any precautions they may have taken to prevent the water from flowing into their own or their neighbor's premises, or of the condition or location of the premises trespassed upon. (*Bailey v. Mayor*, 2 Denio, 433.) It makes no difference that the work was lawful and the manner of conducting it workmanlike. (*Adams v. Walker*, 34 Conn. 466; *Hay v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Denison*,

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58 id. 416.) Nor that the damage arose directly from the wrongful act or interference of a third party. (*Congreve v. Morgan*, 8 N. Y. 84; *Prixley v. Clark*, 35 id. 520; *Bellows v. Sacket*, 45 Barb. 102; *Thomas v. Kenyon*, 1 Daly, 132; *Jutte v. Hughes*, 67 N. Y. 267; *Vanderwiele v. Taylor*, 65 id. 341; *Dygett v. Schanck*, 23 Wend. 466; *Chase v. N. Y. C. R. R. Co.*, 24 Barb. 273.) Whether or not defendants had a permit from the city, giving them permission to construct vaults under their sidewalk was wholly immaterial. (*Lewenthal v. Mayor, etc., of New York*, 61 Barb. 511; *Donahue v. Mayor, etc., of New York*, 3 Daly, 65; *Lacour v. Mayor, etc., of New York*, 3 Duer, 406; *Barton v. City of Syracuse*, 36 N. Y. 54; *Storrs v. City of Utica*, 17 id. 107; *Creed v. Hartman*, 29 id. 591; *Brant v. City of Albany*, 5 Hun, 591; *Byrnes v. City of Cohoes*, 67 N. Y. 402; *Irwin v. Wood*, 51 id. 224.) The charge "and you must, if necessary to give the plaintiffs compensation to the present time, add interest to the amount of the loss" was correct. (2 Parsons on Contracts [ed. of 1860], 382; Sedgwick on Damages, 385; *Green v. The Mayor*, 3 Robt. 406; *Walrath v. Redfield*, 18 N. Y. 457; *Parrott v. Knickerbocker Ice Co.*, 46 id. 361.) The new matters set up in the answer do not fall within the definition of a counter-claim under section 149 of the Code. (*McKenzie v. Farrell et al.*, 4 Bosw. 192; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Bernheimer v. Willes*, 11 Hun, 16; *Isham v. Davidson*, 52 N. Y. 237; *Jordon v. Nat. Shoe & Leather Bk.*, 74 id. 467.)

RAPALLO, J. The most important points in this case are those which arise upon the rulings of the judge at the trial, that the defendants were liable for the damages caused by the flooding on the 27th of July, 1873, and that they were also liable for the damage on the 29th of August, if it arose from the same cause as that in July, and his refusal to submit to the jury any questions as to the liability of the defendants, except those relating to the amount of damages.

As the complaint was originally framed, the injury was alleged to have been caused by the excavation by the defend-

ants of their own lot for the purpose of laying the foundation and constructing the cellar of a building they were about constructing, and negligently and wrongfully permitting large quantities of water to collect upon the excavated part of their own premises, adjoining the store of Weeks & Co., and to remain there until they penetrated through the ground, into, and upon, the premises of Weeks & Co., and flooded the same, and damaged the goods in their basement.

Before the trial, the plaintiffs, by leave of the court, amended their complaint by inserting an averment that the defendants did also, wrongfully and negligently, interrupt the flow of water, which, in times of rain and storm, passed in the gutter and street fronting the premises occupied by said firm of Weeks & Co., and the premises of the defendants, and divert it therefrom, so that it flowed upon, and into, the premises occupied by said firm, and into their vault, etc., and into their sub-cellar, where were stored large quantities of merchandise.

The evidence upon the trial showed that, in July, 1873, the firm of Weeks & Co. (the plaintiff's assignors) occupied a store fronting on the northerly side of Duane street, in the city of New York. The store had a cellar, and also a sub-cellar, under the main building, and also a vault under the sidewalk, in front, but the floor of the vault was level with that of the cellar, and its walls and foundations were not as deep as those of the sub-cellar. The defendants were engaged in erecting a large building on the westerly side of the store, and had excavated and laid foundations for that purpose to the same depth as those of the sub-cellar of the store, and had extended their vault under the sidewalk to the same depth. In so doing, they had taken up the sidewalk, and the curb and gutter, and excavated a space in the street, extending about two feet outside the line of the curb, but the excavation in front of this wall had not been filled in, and there was thus left an open space in the street of eighteen inches, or two feet, in width, along, and in front of, the front wall of the defendant's vault. There was, also, a space of some inches on Weeks & Co.'s lot, between the easterly wall of defendants' building and vault, and

the westerly wall of the store and vault of Weeks & Co., it appearing that in building the store the builder had omitted to cover the entire lot; and, also, that the westerly wall was out of plumb, and inclined toward the east. This open space communicated with the excavation in the street in front of the wall of defendants' vault. The defendants had excavated this space between the lots, close up to the wall of the vault of Weeks & Co. Water falling into the excavation which the defendants had made in the street would naturally find its way into the space between the walls. The grade of Duane street descended from east to west, so that when the premises were in their ordinary condition, surface water flowed westwardly through the gutter in front of the store of Weeks & Co., and passed off through the gutter in front of defendants' lots, but the removal of the curb and gutter in front of defendants' lots would naturally throw the surface water into the excavation made by the defendants, to their injury, as well as to that of Weeks & Co.; and to prevent this, the defendants had constructed a dam, extending from the sidewalk, in front of the store of Weeks & Co., near the excavation, to the centre of the street, the effect of which was to turn the water across the street and let it flow through the gutter on the opposite side.

On the night of the 27th of July, 1873, during a heavy rain, the dam broke away, or was in some manner injured, so that it let the water into the excavation which the defendants had made in the street in front of the front wall of their vault. Thence it found its way under the foundation of the vault of Weeks & Co. (which was not as deep as that of the defendants), forced up the floor, and got into their area and sub-cellar, where the principal damage was done.

It was claimed by the defendants that the water got into the premises of Weeks & Co. from the space between the buildings, through holes or openings, which had been left in the westerly wall of the cellar; and also, that it came from the sidewalk. Some of the water may have come in through these holes, but we think that, taking the evidence on both sides, it is incontestable that the causes of the injury were the

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removal of the curb and gutter, and the excavation in the street outside of the curb-line and of the front wall of defendants' vault, and that, on the breaking away of the dam, the water poured from the street gutter into that excavation, and into the small vacant space on Weeks & Co.'s lot, which lay between the side walls of the two vaults and buildings, and by that means got into Weeks & Co.'s vault and cellar. The theory that the damage was caused by the excavation made by the defendants on their own premises is not sustained by the evidence.

The defendants gave evidence to show that the dam was built properly, and that due care had been taken on their part to protect the premises. It was, however, conceded on their part, and proved by their own architect, who was a witness on their part, that when they commenced the erection, the street was paved and the sidewalk laid, guttered and curbed, and that they took up the gutter and curb to build the vault. That the front vault wall was built on a batter, and at the foundation extended a few inches outside the curb-line, but that the incline brought it to a line at the curb, and it appeared that the excavation outside the curb-line had been left open for the purpose of allowing the wall to dry and harden.

The general rule is well established that an unauthorized interference with, or excavation in a highway, or a street of a city for the private benefit of adjoining premises, is wrongful, and the party responsible for it is liable to all persons injured thereby, irrespective of any question of negligence. (*Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Creed v. Hartmann*, 29 N. Y. 591; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Morgan*, 18 N. Y. 84.) It is said in some of these cases that where an excavation in a street is made by consent of the municipal authorities, it is not *per se* unlawful and a nuisance, and that the person making it is not absolutely liable to persons suffering injury by reason thereof, but only for want of proper care to avoid such injury, and the defendants in this case, for the purpose of showing such consent, put in evidence, under objection, a permit of which the following is a copy:

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"No. 602. OFFICE OF THE DEPARTMENT OF PUBLIC WORKS.

Permission is hereby given to Manhattan Real Estate Association to construct a vault in front of premises known as north side of Duane street, commencing at north-east corner of Church street, and running east two hundred and thirty-four feet, used as business. Said vault to be fifteen feet in width and two hundred and thirty-four feet in length, outside measurement, and to occupy thirty-five hundred and ten square feet, upon condition that the person or persons to whom this permit is granted will in all respects comply with the corporation ordinances relative to 'vaults, cisterns and areas,' and that in no case shall this permit be construed as authorizing the extension of said vault beyond the line of the curb-stone or sidewalk. It is distinctly understood that this permit gives no authority, and it is strictly forbidden to disturb, by excavation or otherwise, any water hydrant or stop-cock chamber, or do any thing to prevent the proper use of any hydrant or stop-cock, or expose them to freezing.

Received from Jarvis Slade the sum of \$2, 632. 50 in payment for the above permit, at the rate of seventy-five cents per superficial foot.

Keep this on the work.

GEO. M. VAN NORT,

Commissioner of Public Works.

WM. LOCKWOOD,

Water Purveyor."

This permit was not set up in the defendants' answer, nor was there any proof of the corporation ordinances regulating such permits, nor of the authority of the persons by whom it purports to have been signed, to grant it, but when offered in evidence it was not objected to on these grounds, but generally, no ground of objection being specified. It appears on its face, however, that it was granted on conditions which are not shown, and also upon the express condition that the vault should not extend beyond the line of the curb-stone or sidewalk

It is very doubtful whether this permit authorized the excavation beyond the line of the curb, and the removal of the curb

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and gutter, which were the causes of the damage. That question would be a serious one if this case were of the same description as those to which we have referred, and in which it is said that the consent of the municipal authorities renders lawful an excavation in a street, and relieves the party making it from the charge of creating a nuisance, and for liability for injuries to third persons, if proper care is used to prevent it. Those were cases of persons injured while traveling on the street or highway. As to the traveling public it may be that the municipal authorities can license acts in reference to the streets, which they might lawfully perform themselves, and that a person acting under such a license is not chargeable with creating a nuisance, or unlawfully obstructing or injuring the public highway, if he exercises due care. But a different question arises where the wrong complained of consists in doing damage to neighboring property by collecting surface water, or diverting it from its accustomed channel without providing another, and thus throwing it upon the land of an adjacent owner.

The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay v. Cohoes Co.* (2 N. Y. 159), *St. Peter v. Denison* (58 id. 416; 17 Am. Rep. 258), *Jutte v. Hughes* (67 N. Y. 267), in which it is held that where one is making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases. A municipal corporation has itself been held liable for throwing water collected in the gutter of a street, upon the land of a private owner (*Byrnes v. City of Cohoes*, 67 N. Y. 204), and in *Jutte v. Hughes* (id. 267), where a private owner paved his yard, thus rendering it less penetrable by water, and conducted water in leaders from the roofs of his houses to his yard in a quantity beyond the

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capacity of the drains to carry away, and thus flowed the premises of his neighbor; it was held that he was absolutely bound to prevent the water which accumulated on his own premises from causing injury to his neighbor's, and that it was error to submit to the jury whether he had done every thing that was possible under the circumstances, and practicable in the way of drainage to carry off the water.

A municipal corporation may, in many cases, in the exercise of powers legally granted to it for public purposes, do acts with reference to the public streets which may result in consequential injuries to the property of adjacent owners, and be exempt from liability except for negligence, but it cannot delegate power to private individuals, to be exercised for their own private benefit, to do injury to the property of their neighbors, and relieve them from responsibility for the damages they may occasion, or reduce their liability to such as may result from want of care. At all events no such power has been shown to exist in the present case.

We are for these reasons of opinion that the permit given in evidence did not protect the defendants from absolute liability for the damages caused by the flooding of July 27, and that the judge properly declined to submit to the jury the question of negligence.

A point is made with reference to the charge that the defendants were also liable for the damage caused by the flooding of August 29, if it came from the same cause as that of July 27. The claim is that the complaint was not amended as to the flooding of August 29, and that the original allegations do not cover the facts which were proved with reference to the flooding of July 27. We do not think this objection available now, as it was not taken at the trial. The evidence as to both floodings was received without objection and nothing was said at the time with reference to the pleadings differing as to the two cases.

There is nothing in the case to raise the question, but a general exception to the portion of the charge last referred to.

The defendants also contend that if the injury arose from

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the failure of the proprietor of Weeks & Co.'s stone to finish out the sidewalk and curb and gutter, so as to carry the water beyond the line of his lot, and the water thus got into the vacant space between the two buildings, the defendants are not liable, and that this question should have been submitted to the jury. We do not see how any such question is presented. The evidence is that the street was paved, and sidewalk and curb and gutter laid in front of all the premises in question. There was no uncovered space between the lots of the parties until the defendants took up the sidewalk, curb and gutter, and if such a space was then created, the defendants must themselves have created it, and must have taken up part of the curb and gutter in front of the lot of Weeks & Co.

If there was no such space, the injury must have resulted from the water collected in the gutter being thrown into the excavation in the street in front of defendants' lot, outside of the curb and gutter line. In either case the injury was produced by the unlawful act of the defendants. The presumption is that the curb, and gutter, and pavement were laid by the municipal authorities, and there is no evidence that they were not continuous until the defendants took them up.

We do not regard, as material, the question whether any of the water which got into the store of Weeks & Co. came through the holes in the side wall. They were under no obligation to make the wall impervious to water which might be wrongfully thrown upon their premises. (*St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258.)

We find no exception to the rulings of the court on the question of damages, which entitles the defendant to a new trial. The allowance of interest is sustained by the cases of *Walrath v. Redfield* (18 N. Y. 457), and *Parrott v. Knickerbocker and N. Y. Ice Cos.* (46 id. 361). The trial-judge, in conformity with those cases, submitted to the jury the question whether the allowance of interest was necessary to give the plaintiffs compensation. The alleged errors of the jury, in respect to the amount of damages, cannot be corrected here.

There was no error in denying the defendants' motion to

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reduce the verdict and judgment by the amount of the counter-claim set up in the answer. No point was made at the trial in respect to this counter-claim, and consequently there is no exception to its disallowance. When the motion to reduce the verdict was subsequently made, the court was justified in taking into consideration the legal objections to the allowance of this counter-claim. These were two-fold. First, the action was for a tort, and the counter-claim was on contract; and, second, the action was upon a demand in favor of Weeks, Linsley & Shephard, and assigned by them to F. S. Weeks and George S. Weeks, and which subsequently passed to their assignee in bankruptcy, and the counter-claim was for rent of premises other than those on which the damage was done, accruing under a lease to F. S. Weeks alone. (*Jordan v. Natl. Shoe and Leather Bank*, 74 N. Y. 467; 30 Am. Rep. 319.)

The judgment should be affirmed.

All concur, except MILLER, J., absent.

Judgment affirmed.

ISAIAH T. WILLIAMS et al., Respondents, v. LOREN INGERSOLL et al., Appellants.

The plaintiffs, who were attorneys and counselors, were employed in one or the other capacity by defendant H. in various suits and legal proceedings between him and defendants L. & J. H. Ingersoll; one was an action for malicious prosecution brought by him during the progress of the litigations. H. made an oral agreement with plaintiffs that they should be paid for their services out of any moneys he should obtain or become entitled to from any of the suits or proceedings, and "should have a lien for all sums that might be owing or due them for their said services and for the services of each of them," which lien should be superior to any right he might have. All of these actions and proceedings were finally, by agreement of the parties, submitted to an arbitrator, who among other things awarded to H. \$10,000 as damages for the malicious prosecution. In an action to enforce their alleged claim and lien upon the award, wherein the value of plaintiffs' services was found to be more than the amount thereof, *held*, that the agreement operated as an equitable assignment, which attached to the award as soon as it was made, and was good against H. or any attaching creditor,

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and this, although it was for damages on account of a personal tort ; that it was not needful in order to make such assignment or lien valid and effectual that notice thereof should have been given to the debtors.

People. ex rel. Stanton, v. Tioga C. P. (19 Wend. 78), distinguished.

It seems that such notice would have been necessary only to defeat a subsequent *bona fide* payment by the debtors.

Watts v. Porter (3 E. & B. 743), stated to have been overruled.

Before the said award was made, defendant B. recovered a judgment in this State against H. which was assigned to defendant Ivins. Two days before the time fixed by the award for the payment of the \$10,000 Ivins brought an action in Connecticut against H. upon the judgment. an attachment was issued therein which was served in that State on L. Ingersoll who then resided therein, and the sheriff returned the writ with his indorsement that L. Ingersoll disclosed an indebtedness on the part of the garnishees to H. of \$10,000. The Ingersolls had no notice of the lien of plaintiffs upon the award, until after service of the attachment. Ivins, after the commencement of this action, recovered judgment in the Connecticut action, and after return of execution unsatisfied, a *scire facias* was issued according to the law and practice of that State against the Ingersolls, to compel payment by them of the amount of the judgment ; they appeared in answer thereto and informed the court of plaintiffs' claim ; it ordered notice to be given to plaintiffs of the attachment proceedings. Plaintiffs did not appear, and the *scire facias* is still pending. Prior to the commencement of this action, L. Ingersoll had removed to this State, and all the other parties were then, and at the time the attachment was served, residents therein. *Held*, that the debt created by the award had its *situs* in this State and so was not affected by the attachment ; also that, as at the time of the service thereof the debt did not belong to H., nothing was attached, and as to plaintiffs the attachment was a nullity. .

It seems that the judgment herein may be used to defeat the Connecticut attachment.

But *held*, that the Ingersolls, if they desire, might have, as part of the judgment herein, an injunction restraining Ivins from proceeding further in the foreign jurisdiction.

No greater force or efficacy will be given to a foreign than to a domestic attachment.

By the award H. was found indebted to various parties connected with the litigation in specified sums, and among them to J. H. Ingersoll. It was claimed, on behalf of the Ingersolls, that these items should be allowed as offsets. *Held* untenable, as the items were not payable to the two Ingersolls, who owe the amount of the award claimed, and as provision was made for their payment by deduction from another sum due H., to be ascertained as prescribed by the award.

It seems that plaintiffs could claim no general lien, as attorneys, upon the award.

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It seems also that plaintiffs could not base their claim to an equitable lien upon the mere promise of H. that they should be paid out of any moneys recovered.

An agreement, either oral or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment.

(Argued May 2, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 14, 1880, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term. (Mem. of decision below, 23 Hun, 284.)

The nature of the action and the material facts are stated in the opinion.

Joseph H. Choate for appellants Ingersolls. The portion of the award giving Heath \$10,000 damages in suit No. 29 is inseparable from, and dependent and conditional upon, the complete performance by Heath of all the things required of him by the award. (*Huy v. Brown*, 12 Wend. 591; *McNeil v. McGee*, 5 Mason, 244; *Shearer v. Handy*, 22 Pick. 417; *Matthews v. Matthews*, 2 Curtis' C. C. 105; *Grant v. Johnson*, 5 N. Y. 247; *Farmers' Loan and Trust Co. v. Hunt*, 16 Barb. 514; *Selden v. Pringle*, 17 id. 458; *Lester v. Jewett*, 11 N. Y. 453; *Cole v. Blunt*, 2 Bosw. 116.) If Heath had attempted to assign this claim to the plaintiffs prior to the award, the assignment would have been a nullity and void, because the subject thereof was a claim for damages for a personal tort. (*People v. Tioga C. P.*, 19 Wend. 73; *Hodgman v. Western R. R. Corporation*, 7 How. Pr. 492; *Pulver v. Harris*, 52 N. Y. 73; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 id. 443.) If the claim of Heath for the damages were capable of legal or equitable assignment, or of an assignment which would attach to the judgment when recovered, so as to give an equitable interest therein, what passed between Heath and the plaintiffs was not sufficient to make out such an equitable assignment. (Code of Civil Procedure, § 499; *Rogers v. Ho-*

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sack's Exrs., 18 Wend. 319; *Dickerson v. Phillips*, 1 Barb. 454; *Gibson v. Stone*, 43 id. 285; *McEwen v. Brewster*, 17 Hun, 223; *Hoyt v. Story*, 3 Barb. 264; *Christmas v. Russell*, 14 Wall. 69; *Trist v. Child*, 21 id. 447; *Hutter v. Ellwanger*, 4 Lans. 8; *Vreeland v. Blunt*, 6 Barb. 182; *Shaver v. W. U. Tel. Co.*, 57 N. Y. 459; *Wright v. Ellison*, 1 Wall. 16; *Brown v. Mayor*, 11 Hun, 21; *Rooney v. Second Ave. R. R.*, 18 N. Y. 368; *Chase v. Peck*, 21 id. 581; *Payne v. Wilson*, 74 id. 348.) At the time of the levy of the attachment of Ivins, the supposed rights of the plaintiffs being entirely secret and unknown to either the Ingersolls, or the attaching creditor, Ivins, by his attachment, secured a lien upon the fund prior in law and equity to any claim of the plaintiffs. (*Bayley v. Greenleaf*, 7 Wheat. 46; *Thompson v. Van Vechten*, 27 N. Y. 568; *McFarland v. Wheeler*, 26 Wend. 467; *Wood v. Partridge*, 11 Mass. 488; *Phillips v. Stagg*, 2 Edw. 108; *Redfearn v. Ferrier*, 1 Dow. 50; *Murray v. Lyeburn*, 2 Johns. Ch. 441, 443; *Livingston v. Dean*, id. 479, 480; *Black v. Zacharie*, 3 How. [U. S.] 483, 512, 514; *People v. Tioga C. P.*, 19 Wend. 75; *Fisher v. Prest., etc., Essex Bk.*, 1 Am. Ry. Cas. 127; *Parks v. Innes*, 33 Barb. 37; *Story's Eq. Jur.* 421b, 1035a; *Foster v. Blackstone*, 1 M. & K. 297; *Affd. H. of Lords*, 9 Bligh, 332; *Timson v. Ramsbottom*, 2 Keen, 35; *Stuart v. Cockerell*, L. R., 8 Eq. 607; *In re Russell's Policy Trusts*, L. R., 15 Eq. 26; *Dearle v. Hall*, 3 Russell, 1; *Loveridge v. Cooper*, id. 30; *Foster v. Cockerell*, 9 Bligh, 332, 375.) The court in Connecticut having, by the attachment, levied upon the fund before the commencement of this suit, or the service of the notice upon which it is based, had full jurisdiction to determine the question at issue between the parties in respect to the *res* attached. (Wharton on Conf. of Laws, § 787; *Philips v. Hunter*, 2 H. Bl. 402; *McDaniel v. Hughes*, 3 East, 367; *Embree v. Hanna*, 5 Johns. 101; *Holmes v. Remsen*, 4 Johns. Ch. 460; 20 Johns. 229; 2 Pars. on Cont. 607; *Wheeler v. Raymond*, 8 Cow. 311.) Where arbitrators transcend their authority, their award *pro tanto* will be void; but if that which is void affects not

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the merits of the submission, the residue will be valid. (*McBride v. Hagan*, 1 Wend. 327; *Mayor, etc., v. Butler*, 1 Barb. 333; *Beckwith v. Warley*, Rolle's Abr. Arb. H. 9, 250; *Skillings v. Coolidge*, 14 Mass. 43; *Cox v. Jagger*, 2 Cow. 625.) An award will be construed so as to sustain it if possible. (Morse on Arbitration, 438; 2 Pars. on Cont. 692-696; Story's Eq. Jur., § 64e; *Sturges v. Champneys*, 5 M. & C. 97; *Smith v. Felton*, 43 N. Y. 424; Story's Eq., § 1437b.)

Samuel Hand for appellants Brady and Ivins. The alleged agreement between Heath and the plaintiffs being secret and suspicious in its character and circumstances, was against public policy and should not be enforced in equity. (*Bayley v. Greenleaf*, 7 Wheat. 46; *Thompson v. Van Vechten*, 27 N. Y. 568; *McFarland v. Wheeler*, 26 Wend. 467; *Moore v. Holcombe*, 3 Leigh, 601.) An agent or attorney does not acquire a lien on a fund by meritorious services and outlays expended in creating it. (*Pulver v. Harris*, 52 N. Y. 73; *Wright v. Ellison*, 1 Wall. 16; *Trist v. Child*, 21 id. 441.) No matter what may be the intent of the parties an attempt to assign moneys will not be effectual unless the particular fund from which they are to be paid is distinctly specified and identified in the agreement. (*Hutter v. Ellwanger*, 4 Lans. 8; *Vreeland v. Blunt*, 6 Barb. 182; *Shaver v. W. U. Tel. Co.*, 57 N. Y. 459; *Watson v. Duke of Wellington*, 1 R. & M. 601.) There can be no equitable lien for services established where the amount thereof is not fixed. (*Wright v. Ellison*, 1 Wall. 16.) An agreement to pay a creditor out of a particular fund does not constitute an assignment of or give the creditor a specific lien upon the fund. (*Rogers v. Hoosack's Exrs.*, 18 Wend. 319; *Hoyt v. Story*, 3 Barb. 262; *Gibson v. Stone*, 43 id. 285; *Brainerd v. Burton*, 5 Vt. 97; *Christmas v. Griswold*, 8 Ohio St. 558; *Eib v. Martin*, 5 Leigh [Va.], 132; *Christmas v. Russell*, 14 Wall. 69; *McEwen v. Brewster*, 17 Hun, 223; *Ex parte Tremont Nail Co.*, 16 B'k'cy Reg. 448; Dickerson, Sr., 345.) The rule is the same even where the debtor has publicly signified his intention of so

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appropriating the fund as by drawing an order in writing. (*Dickerson v. Phillips*, 1 Barb. 454; *Tyler v. Gould*, 48 N. Y. 683; *Clayton v. Fawcett*, 2 Leigh, 19.) Where the owner of a chose in action does not irrevocably part with all his rights against his debtor, there is no assignment. (*Rogers v. Hoosac's Exrs.*, 18 Wend. 319; *Hoyt v. Story*, 3 Barb. 262; *Rupp v. Blanchard*, 34 id. 627; *Gibson v. Stone*, 43 id. 291; *Christmas v. Russell*, 14 Wall. 69; *Trist v. Child*, 51 id. 447.) Assuming the alleged agreement between Heath and the plaintiffs to have been valid, still it was ineffectual to create any equities superior to the claims of these attaching creditors for want of notice to them or to the debtor Ingersoll, and because it was a mere executory contract. (*Bishop v. Holcomb*, 10 Conn. 446; *Story's Conflict of Laws*, § 400a; *Park v. Inness*, 33 Barb. 37; *People v. Tioga C. P.*, 19 Wend. 75; *Murray v. Leyburn*, 2 Johns. Ch. 441, 443; *Livingston v. Dean*, id. 479, 480; *Thompson v. Van Vechten*, 27 N. Y. 568; *Black v. Zacharie*, 3 How. [U. S.] 483, 512, 514; *Moore v. Gravelot*, 3 Brad. [Ill.] 457; *Dearle v. Hall*, 3 Russell, 1; *Loveridge v. Cooper*, id. 30; *Fisher v. Prest. Essex Bk.*, 1 Am. Ry. Cas. 127; *Coughlin v. N. Y. C. & H. R. R. R.*, 71 N. Y. 450; *Brainerd v. Burton*, 5 Vt. 97; *Mogg v. Baker*, 3 M. & W. 195; *Moody v. Wright*, 13 Metc. 17, 31; *Stearns v. Quincy*, 124 Mass. 31; *White v. Coleman*, 127 id. 34; *Fisk v. Potter*, 2 Keyes, 64, 75.) The rule that an assignee or an attaching creditor takes subject to all equities against the thing he thus obtains is to be interpreted as referring to equities in favor of the debtor or attaching to the thing and not to equities in favor of third persons. (*Redfearn v. Ferrier*, 1 Dow. 50, 68; *Murray v. Lylburn*, 2 Johns. Ch. 441, 443; *Livingston v. Dean*, id. 479, 480; *Moore v. Holcombe*, 3 Leigh, 597, 602; *White's Heirs v. Prentiss' Heirs*, 3 Monr. [Ky.] 510; *People's Bk. v. Gridley*, 91 Ill. 457.) Whatever equitable lien the plaintiffs may have originally obtained was lost and surrendered by them on the submission to arbitration and was never recovered. (*Lorillard v. P. & N. Y. M. S. M. Co.*, N. Y. Daily Reg., Dec. 17, 1878, *Coit v. Fougere*, 36 Barb. 198, *Legg v. Willard*, 17 Pick.

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140; *Trist v. Puirsson*, 1 Hilt. 292; *Judson v. Corcoran*, 17 How. [U. S.] 612; *McFarland v. Wheeler*, 26 Wend. 467; *Bevan v. Waters*, 3 C. & P. 520.) No contract between Heath and the plaintiffs jointly being established by the evidence, there is therefore such a failure of proof as entitles the defendants to judgment. (*Esterbrook v. Messersmith*, 18 Wis. 545; *Masters v. Freeman*, 17 Ohio St. 323; *Liffred v. Edwards*, 39 Ind. 165, 170; *Calkins v. Smith*, 48 N. Y. 614, 619.) The alleged assignment to the plaintiffs was void because the subject thereof was a claim for damages by Heath for a personal tort. (*Hodgman v. W. R. R. Co.*, 7 How. 492; *Pulver v. Harris*, 52 N. Y. 73; *People v. Tioga C. P.*, 19 Wend. 73; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443.) The attachment proceedings in Connecticut were proceedings *in rem*, and conclusive everywhere. (*Green v. Van Buskirk*, 7 Wall. 139; Story on the Constitution, § 1313; Story on Conflict of Laws, §§ 592a, 549; *Cooper v. Reynolds*, 10 Wall. 308, 317; *Embree v. Hanna*, 5 Johns. 103; *Monroe v. Douglas*, 4 Sandf. Ch. 126; *Starbach v. Murray*, 5 Wend. 148; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600; *Holmes v. Remsen*, 20 Johns. 229.) The plea of the attachment in Connecticut was a sufficient plea in abatement. (*Embree v. Hanna*, 5 Johns. 100.)

I. T. Williams for respondents. It was not necessary in order to effect a valid equitable lien upon or assignment of the fund in question, that it should then be in existence. (Story's Eq. Jur., §§ 1040, 1047, 1055; *Morton v. Naylor*, 1 Hill, 583; *Cromwell v. The Brooklyn F. Ins. Co.*, 39 Barb. 227; 44 N. Y. 72.) It does not matter that the cause of action out of which the fund arose was not assignable. (*People v. Tioga C. P.*, 19 Wend. 72.) Nor is it material that the amount is not liquidated. (*Ward v. Syne*, 9 How. 25; *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368.) It is immaterial whether the defendants had knowledge of this lien or assignment. (2 Story's Eq. Jur. [10th ed.], §§ 1040, b. 1044, 1057; *Carr v. Hilton*, 1 Curtis' C. C. 390.) Nor is it material that the assignment was an assignment of a prospective fund

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which might result from a litigation, whatever it might be. It was not void for champerty or maintenance. (*Thalhimer v. Brinckerhoff*, 3 Cow. 623; 3 Ring. 309; Young & Jerv. 129; 2 Story's Eq. Jur., § 1040; *Findon v. Parker*, 11 M. & W. 675-682; Story's Eq. Jur., § 1050; R. S. [6th ed.] 970; *Voorhees v. Dorr*, 51 Barb. 580; *Dungin v. Ireland*, 14 N. Y. 322; *Benedict v. Stewart*, 22 Barb. 420; *Hogerty v. Jordan*, 2 Robt. 319; 7 Wait's Actions and Defenses, 78; *Sedgwick v. Staunton*, 14 N. Y. 289; *Zogbaum v. Parker*, 66 Barb. 341; *S. C.* affirmed, 55 N. Y. 120.)

EARL, J. The plaintiffs were attorneys and counselors at law, practicing their profession in the city of New York. During several years before the commencement of this action the defendant Heath was extensively involved in litigation with the defendants Ingersoll and with other parties. He became a party to many legal proceedings and actions in all of which one of the plaintiffs was either his attorney or counsel. One of the actions was brought by Heath against the Ingersolls to recover damages for malicious prosecution. All the proceedings and actions were finally, by agreement of all the parties, submitted to an arbitrator, who after hearing all the parties made his award in and by which, among other things, he awarded to Heath against the Ingersolls for damages on account of the malicious prosecution the sum of \$10,000. During the progress of the litigation, the plaintiffs, feeling uneasy about their compensation for the services which they were rendering, and were expected to render for Heath in the various actions, made an oral agreement with him, which is alleged in the complaint, and found by the trial judge as follows: "That the plaintiffs should be paid for their said services out of any moneys that the said Heath should obtain or become entitled to from any of the matters, suits and proceedings in which they should be engaged;" and that they "should have a lien for all sums that might be owing or due them for their said services, and for the services of each of them, and for the services of the attorneys employed by them to the extent of the worth and value thereof

upon any sum he might obtain or become entitled to from the said defendants Lorin and James H. Ingersoll, or from any other person or party connected with said suits, matters and proceedings superior to any right the said Heath might have thereto, and which should be paid to them before the said Heath should have or be entitled to receive any part thereof, or right thereto.”

Before the award which has been referred to was made, the defendant Brady recovered a judgment in the Supreme Court of this State against Heath for upwards of \$7,000, and that judgment was assigned to the defendant Ivins. On the 28th day of October, 1878, two days before the time fixed by the award for the payment of the \$10,000 to Heath, Ivins brought an action in the Supreme Court of Connecticut, in Middlesex county, against Heath upon the judgment recovered against him by Brady, and on the same day sued out an attachment thereon, and the sheriff of Middlesex county immediately served the attachment on Lorin Ingersoll, at Portland in Connecticut, where he then resided; and returned the writ with his indorsement thereon that Lorin Ingersoll disclosed an indebtedness on the part of the garnishees to Heath of \$10,000. The Ingersolls did not have any knowledge or notice of the lien of the plaintiffs upon the award until after the attachment was served.

On February 18, 1879, Ivins recovered judgment in his action against Heath for upwards of \$8,000, and on the 17th day of March, execution was issued on the judgment to the sheriff of Middlesex county, and by him was returned unsatisfied. A *scire facias* was thereupon issued out of the Connecticut court according to the law and practice of that State against the Ingersolls to compel them to pay the amount of the judgment. On the 23d day of April, 1878, the Ingersolls appeared in the Connecticut court in answer to the *scire facias*, and informed that court of the claim of the plaintiffs upon the award.

The court then ordered notice to be given to the plaintiffs of the attachment proceedings that they might appear before it, and substantiate their claim if they saw fit according to the

laws of that State, which fully provide for the trial of rival claims to a garnisheed fund. That notice was duly given to the plaintiffs, but they did not appear, and the *scire facias* is still pending there, and the attachment is still in full force and effect in that State.

This action was commenced on the 16th day of January, 1879, before the recovery in Connecticut of the judgment by Ivins against Heath, and before any thing had been done in the attachment proceeding except the service of the attachment. The plaintiffs claim that the whole amount of the award was due and payable to them by virtue of their agreement with Heath, and this action was brought to enforce their claim to and lien upon the award, and to foreclose and cut off any claim thereon which the defendants Brady and Ivins might have.

It is denied by the defendants, except Heath who suffered default, that the plaintiffs by virtue of any agreement with Heath have any claim to or upon the award which is superior to the claim or lien obtained by Ivins by virtue of the Connecticut attachment proceedings, and this presents the first question for our determination.

There are several obvious reasons for holding that the plaintiffs cannot base their right to recover in this action upon any general lien upon the award which the law gave them as attorneys in the various actions and proceedings which were submitted to the arbitrator. Such a lien would not be a joint lien, and an attorney's lien is confined to the judgment in the very action in which the compensation was earned for which the lien is claimed. (*Phillips v. Stagg*, 2 Edw. Ch. 108; *St. John v. Diefendorf*, 12 Wend. 261; *Adams v. Fox*, 40 Barb. 442.) The theory upon which the lien is upheld is that the attorney has, by his skill and labor, obtained the judgment, and that hence he should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures. When, therefore, an attorney has several actions, and recovers judgment in but one of them, he cannot, in the absence of a special agreement, have a lien upon that judgment for his compensation in all the actions.

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Nor can the plaintiffs base their claim to an equitable lien upon the award upon the mere promise of Heath that they should be paid out of any money that should be recovered in any of the actions or proceedings. Whatever the law may be elsewhere, it must be regarded as the settled law of this State that an agreement, either by parol or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund, or operate as an equitable assignment thereof. It was so decided in *Rogers v. Hosack's Executors* (18 Wend. 319.) That case was followed, and the same rule laid down, in *Christmas v. Russell* (14 Wall. 69), and *Trist v. Child* (21 id. 441).

It is contended by the defendants that at the time of the alleged agreement between the plaintiffs and Heath, the claim of the latter which resulted in the award for the \$10,000, was for damages on account of a personal tort, and that, therefore, he could not, at that time, assign or create a lien upon the sum which should be subsequently recovered or awarded; and our attention is called to the case of *People ex rel. Stanton v. Tioga C. P.* (19 Wend. 73), as an authority for the contention. At law, there could be no assignment of the damages, because they were for a personal tort, and the assignment could not take effect upon the award, because that had no existence at the time. But it is otherwise in equity. Story, in his Equity Jurisprudence, in section 1040, says: "Courts of equity will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present, positive transfer, operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*. Thus, for example, the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress will be valid in equity, and will attach to the head-matter and oil when obtained." And so, even the assignment of freight to be earned in the future is good in equity, and will be enforced against the party from whom it becomes due. It is said

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that such assignments always operate by way of agreements or contracts amounting in the consideration of the court to this, that one agrees with another to transfer and make good that right or interest, and like any other agreement, the court will cause it to be specifically performed (not leaving the assignor to his action for damages) when the assignor is in a condition to transfer the thing assigned or causes it to be transferred. (2 Lead. Cas. in Eq. with Hare & Wallace's notes, 204.) Every assignment of a chose in action is merely an executory contract which equity considers as executed, and which the law following equity regards as conferring certain rights which the assignor is bound to respect. If a contract to assign be good in itself and not inconsistent with public policy, it will take effect as an equitable assignment. These views are abundantly sustained by authority; and it cannot be perceived why they do not apply to such a case as this. This agreement was not in violation of any public policy, and it has no features which condemn it in equity. The plaintiffs were not to prosecute the actions upon shares, and their compensation was not contingent upon success. The assignment here could not even in equity operate upon the unliquidated claim for damages on account of the personal tort, but attached to the award the moment it was made. The damages had been suffered. An action had been commenced for their recovery, and hence the award had a potential existence and was not ever a mere possibility. In *People ex rel. Stanton v. Tioga Common Pleas* it was decided that a chose in action for a tort merely personal is not assignable so that a court of law will protect the assignee against a subsequent fraudulent discharge of the damages recovered in a suit prosecuted for such tort, although the tort-feasor accepted the discharge with full knowledge of the assignment; but that the remedy of the assignee is by action against the assignor for breach of his express or implied undertaking not to do any thing in the matter to prejudice the assignee. The adjudication was that the assignment was invalid in a court of law, and whether it could have any operation in equity upon the judgment recovered was not involved or decided in that case, although Judge COWEN in his

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opinion remarked that "neither law nor equity will recognize such a transfer." If by this remark the learned judge meant that neither law nor equity would recognize such a transfer as operating upon the unliquidated damages for the tort, he was right. But if he meant that equity would not recognize such a transfer as attaching to the judgment recovered for the damages, he fell into error and his remark was unsupported by reason or authority. The court there held that the contract of assignment was so far valid as to impose a liability upon the assignor for its breach; that while the assignee could not enforce any right under the assignment against the tort-feasor, the debtor, he could yet have a remedy just as broad against the assignor for a breach of the agreement. It would seem to be reasonably clear that if such an assignment would be so far binding upon the assignor as to make him liable for defeating its operation, it should be binding upon the debtor after he has notice of it, and after the recovery of judgment. But if the court was there right in holding that the assignee has a remedy in such a case against the assignor for defeating the assignment by releasing the assigned claim, then in a case like this in equity with all the parties in court, the assignor consenting by his default, and the fund being still in the hands of the debtors, there can be no reason for defeating the claim of the plaintiffs to recover the fund. As between them and the assignor the fund in good conscience and equity belongs to them, and if the assignor received it he would be under obligation to pay it to them, and we can perceive no reason why equity should not therefore give it to them. We are not confronted with the difficulty which might exist if the Ingersolls had paid the amount of the award to Heath or to Heath's attaching creditors even with knowledge of the assignment. The fund is yet in their hands. The assignor is yet willing that they should pay it to the plaintiffs, and why should they not be compelled to? We can perceive no reason save such as grows out of the attachment proceedings of which we will speak further on.

We therefore hold that there is no difficulty in this equitable action growing out of the fact that the award was for damages

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on account of a personal tort; and a further authority for this conclusion is found in *Patten v. Wilson* (34 Penn. St. 299), where it was held that an agreement by parol between attorney and client that the former should have \$100 for his services "out of the verdict" in an action for unliquidated damages arising from a personal tort operated as an equitable assignment of the judgment entered upon the verdict, and was good against an attaching creditor of the client.

It matters not that the agreement upon which the plaintiffs rely was by parol and not in writing. The agreement was founded upon an adequate consideration and is just as valid and effectual as if made in writing. (*Risley v. Phenix Bank*, 83 N. Y. 318-328, 38 Am. Rep. 421.) Not only can a chose in action be assigned by parol, but a lien upon it can be created by parol. It is not important to inquire here whether the agreement proved by the plaintiffs was an agreement to assign or an agreement for a lien upon any sum which might be recovered, for either agreement would have the same effect, as the plaintiffs' claim is for the full amount of the award. The agreement was not alone that the plaintiffs should be paid out of any sum recovered. Such an agreement, as I have above shown, would not have been sufficient to give the plaintiffs any claim upon the award. But there was also proof tending to show that it was the intention to assign to the plaintiffs or to give them a lien upon any sum recovered and that plaintiffs were to receive the sum recovered and retain out of it their compensation, and to pay the balance if any, to Heath; and for the purpose of upholding the judgment we may assume that the trial judge found any facts which the evidence tended to establish. The form of words used in making the agreement is not alone to receive attention, but all the circumstances of the transaction are to be considered. It is a rule in equity that any thing which shows an intention to assign on the one side and from which an assent to receive may be inferred on the other will operate as an assignment if sustained by a sufficient consideration.

It is strenuously contended that there is no proof justifying

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the finding that the agreement of Heath was made with the plaintiffs jointly. While the evidence upon this point is quite meagre and unsatisfactory, yet there is enough to justify the finding of a joint agreement.

It was not needful to make the assignment or lien valid and effectual against Heath and against his attaching creditors, that notice thereof should have been given to the debtors, the Ingersolls. Such notice was needful only to defeat a subsequent *bona fide* payment by the Ingersolls. It has been held in some of the States and was formerly supposed to be the rule in England, that such an assignment could be valid and operative only in case of and after notice to the debtors. It was held in *Watts v. Porter* (3 E. & B. 743), that an assignment of a mere chose in action without notice to the debtor was inoperative as against a subsequent judgment creditor. But the lord chancellor and Lords Justices KNIGHT, BRUCE and TURNER in *Beavan v. Earl of Oxford* (6 De G. M. & G. 492), and the master of the rolls in *Kinderley v. Jervis* (22 Beav. 1), held a contrary doctrine, and in *Pickering v. The Ilfracombe Railway Co.* (L. R., 3 C. P. 235), BOVILL, Ch. J., and WILLES, J., agreed with the latter authorities. Still later, in *Robinson v. Nesbitt* (L. R., 3 C. P. 264), the case of *Watts v. Porter* was directly overruled, and it was held that a prior equitable assignment of railway shares in the hands of a garnishee was a bar to an attachment, notwithstanding that no notice of such assignment had been given to the garnishee. In *Stevens v. Stevens* (1 Ashmead, 190), it was held that the assignment of a debt due by a third person was a good equitable transfer of such a debt as against a subsequent attaching creditor, notwithstanding no notice of such assignment was given to the debtor until after the attachment. In *United States v. Vaughan* (3 Binney, 394), a similar decision was made, and it was further held that the plaintiff in a foreign attachment stands upon no better footing as to the thing attached than his debtor, the defendant, in the attachment. In *Dix v. Cobb* (4 Mass. 508), PARSONS, C. J., said: "Although the trustee in this case had no notice of the assignment until after he was sued as trustee, yet imme-

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diately on the assignment the equitable interest in the debt as between the parties to it immediately passed to the assignee. And if the assignor had afterward recovered the debt, he would be obliged to pay it over to the assignee. But an attaching creditor cannot stand on a better footing than his debtor (if the assignment be not fraudulent as to creditors), and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently if his debtor have no equitable interest in a *chose in action*, the creditor cannot acquire any by his attachment." In *Muir v. Schenck* (3 Hill, 228), it was held that as between different assignees of a *chose in action* by express assignment from the same person, the one prior in point of time will be protected, though he have given no notice to either the subsequent assignees or the debtor, and the question between a previous assignee and a subsequent attaching creditor was considered the same in principle as that between conflicting assignees. However much that case may have been criticized elsewhere it has been considered well decided in this State. It was cited with approval in *Greentree v. Rosenstock* (61 N. Y. 583), and *Freund v. The Imp. & Tr. Nat. Bank* (76 id. 352).

We must, therefore, hold that the plaintiffs had an assignment of or lien upon the award, good and effectual against the assignor Heath, and his attaching creditor.

We must now consider the effect of the attachment proceeding in Connecticut. At the time the attachment was served, none of the parties concerned, so far as appears, resided in that State but Lorin Ingersoll. All the other parties, the plaintiffs, James H. Ingersoll, Heath, Brady and Ivins, resided, as we must infer, in this State. The award was made in this State, and was at that time held in this State, and hence the debt in no sense had its *situs* in that State. A debt always under general jurisprudence has its *situs* either at the domicile of the creditor or where the written obligation upon which it is due is held, and not at the *situs* of the debtor. Hence under general public law, recognized by all courts, there was nothing in Connecticut to attach. But local laws may fix

the *situs* of the debt at the domicile of the debtor, and under such laws it may be effectually attached against a non-resident creditor, and compulsory payment under the attachment will protect the debtor everywhere against a suit for the recovery of the same debt by the creditor. The law seems to be thus settled for the reason that it would be unjust to compel the debtor to pay his debt twice. (*Embree v. Hanna*, 5 Johns. 101.)

Here the Ingersolls have not paid the debt under the attachment, and when this suit was commenced the attachment had simply been served, and the attachment proceeding is still pending. But in *Embree v. Hanna* it was held that a pending attachment proceeding, under which a debt had been attached by service of the attachment upon the debtor in Maryland, could be pleaded in abatement to an action brought here by the creditors against the debtor for the recovery of the same debt, and the reason of the holding was that the debtor might be compelled to pay twice. The reason of that decision does not apply to this case. Here before the Ingersolls had been compelled to pay, Lorin became a resident of this State, and all the parties at the time of the commencement of this action were residents of this State, and they are all parties to this action. Hence, there is no danger of a compulsory double payment. The judgment in this action can be used in Connecticut to defeat the attachment proceeding; that is, the court in that State, when it is brought to its attention, will undoubtedly respect it and give the garnishees the protection which it affords. And still further, if the Ingersolls desire it, they may now have, as part of the judgment in this equitable action, an injunction restraining the defendant Ivins from proceeding further in the foreign jurisdiction to enforce payment against them. They could probably, on the footing of the judgment in this action, apply at any future time for such an injunction, and as Ivins is within the jurisdiction of the court there can be no difficulty in making the injunction effectual for the perfect protection of the garnishees.

Under such circumstances, it would be a very poor administration of justice which would turn the parties, all residents of

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this State, out of our courts and send them to a foreign jurisdiction to litigate the matters in controversy between them and there are no authorities requiring that it should be done. But there is still a further reason for not applying in this case the rule laid down in *Embree v. Hanna*. At the time the attachment was served in Connecticut, the debt did not belong to Heath, the attachment debtor. As I have shown, he had made an assignment of it effectual against him, and against his attachment creditors. He had nothing, really or constructively, in that State, to be attached, and as to these plaintiffs the attachment there was a mere nullity. It is believed that no case can be found which holds, that when the property of A. is seized in a foreign State under an attachment issued against the property of B., at the instance of the creditors of B., A. is bound to appear in the foreign jurisdiction and assert his title to the property. Such an attachment proceeding would be ineffectual to transfer or change the title to the property. (Story on Conflict of Laws, § 592*a*, note 2.)

If the attachment at the suit of Ivins had been issued in this State, this debt could not have been attached as the debt of Heath, provided notice of plaintiffs' claim had been given to the Ingersolls at any time before payment by them under the attachment, or, perhaps, before their absolute liability to pay under the attachment had been fixed. In this State, the seizure of the property of A., under an attachment issued against B., would be wholly ineffectual, and shall a foreign attachment have greater force than a domestic attachment? These views are, I think, fully sanctioned by the case of *Osgood v. Maguire* (61 N. Y. 524).

The award required Heath to make a certain assignment, to discontinue certain suits, and to execute certain releases, and the defendants Ingersoll claim that he did not do these things, and hence, that the plaintiffs are not in a condition to compel performance of the award on their part. The proof tended to show, and the trial-judge must have found that the assignments, discontinuances and releases were tendered on the day fixed for the performance of the award. The plaintiffs' counsel, on the

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argument, furnished us papers showing that the assignment, discontinuances and releases had been executed and accepted by the Ingersolls. This is, however, somewhat controverted on the part of the Ingersolls. If they have not been executed and delivered, as required by the award, provision can be made if desired by the Ingersolls, in the judgment of this court that the award in that respect shall be complied with before they shall be required to pay the amount awarded against them.

By the award Heath was found indebted to "The Heath and Smith Manufacturing Company" in three small sums, amounting to upwards of \$500; to Theodore P. Austin in two sums, amounting to upwards of \$1,800, and to James H. Ingersoll in the sum of \$1,500, and the claim is made on behalf of the Ingersolls that some, or all, of these items should be allowed to them as offsets against the sum claimed of them by the plaintiffs. It is a sufficient answer to this claim that these items were not due and payable to the two Ingersolls, who owe the amount of the award claimed by the plaintiffs, and that provision is made in the award that these items should be paid by deducting them not from the \$10,000 awarded to Heath, but from another sum due Heath, the amount of which was to be ascertained in the manner prescribed by the award.

I have now given attention to all the points made by the appellants against the judgment appealed from, and the result is that the judgment should be generally affirmed unless the Ingersolls desire some provision inserted therein giving them an injunction restraining the further prosecution of the attachment proceedings in Connecticut, and also a provision in reference to the performance of the award on the part of Heath, as above indicated, in which case application may be made for the settlement of our judgment.

All concur, except MILLER, J., absent.

Judgment accordingly.

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WILLIAM H. EVERSON, Respondent, v. STEPHEN H. POWERS
et al., Appellants.

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Where, upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, *i. e.*, the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge.

It seems that if the trial is before the expiration of the term, plaintiff is entitled to recover such actual damage as the evidence shows he has sustained up to time of trial, and if at that time the loss is still only probable, the recovery should be for nominal damages only.

(Argued May 4, 1882 ; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 3, 1881, which affirmed a judgment of the General Term of the Marine Court of the city of New York, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for the breach of a contract of employment. Plaintiff's complaint alleges that on the 1st day of January, 1878, the defendants entered into an agreement with him by which it was agreed that he should work for the defendants for the term of one year from the 1st day of January, 1878, to the 1st day of January, 1879, for the sum of \$1,052 per year. That said plaintiff entered upon the performance of said contract and worked for the defendants until the 19th day of January, 1878, when the defendants discharged him from their service, and refused to carry out the contract on their part.

For a second cause of action the plaintiff sues as assignee of one Frederick Yager, and alleges that on the 1st of January, 1878, the defendants contracted with said Frederick Yager, whereby it was agreed that said Yager should work for said defendants for the term of one year from the 1st of January,

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1878, till the 1st of January, 1879, for the sum of \$780 per year, and that said Yager, on or about said 1st of January, 1878, entered upon the performance of said contract, and worked for defendants until the 23d of January, 1878, when he was discharged; defendants refusing to carry out said contract with said Yager.

The action was brought August 26, 1878, but was not tried until March, 1879. Verdict for the plaintiff for \$1,731. 94.

Further facts appear in the opinion.

Samuel Hand for appellants. On a contract for services no greater recovery can be had than the amount due, if any thing, at the time of the commencement of the action. (*Howard v. Daly*, 61 N. Y. 362; *Taylor v. Bradley*, 39 id. 141; *Toles v. Hazen*, 18 Alb. L. J. 476; *Heim v. Wolf*, 1 E. D. Smith, 10.) It makes no difference with this principle when the action happens to be tried. (*Wattson v. Tibou*, 17 Abb. 184; *Smyth v. Alyesworth*, 40 Barb. 104; *Castrique v. Bernabo*, 6 Ad. & El. [N. S.] 498.)

S. Jones for respondent. The measure of damages adopted by the trial-judge was correct. (Sedgwick on the Measure of Damages [1st ed.], 107, 108; id. [6th ed.] 122; *Wilcox v. Exrs. of Plummer*, 4 Peters, 172; Wood on Master and Servant, 249, 250; *Fowler v. Armor*, 24 Ala. 194; *Page v. Parihan*, 8 Ga. 190; *Hochster v. De La Tour*, 2 E. & B. 678; *Roper v. Johnson*, L. R., 18 C. B. 767; 31 L. J. Ex. 84; *Frost v. Knight*, L. R., Exch. 111.)

TRACY, J. The only question presented upon this appeal relates to the rule of damages to be applied in an action for a breach of a contract of employment where the servant has entered upon the performance of a contract, has been discharged, and brings his action before the expiration of the term, but the trial does not occur until afterward.

The case does not contain the evidence taken upon the trial,

and the question is presented by an exception to the charge of the judge.

The judge charged that, if the plaintiff was entitled to recover, he was entitled to "the difference as between what the contract called for for the year 1878 and the amount he actually received, and what he was enabled to earn after his discharge that year, which would be \$970. It appears that he used every endeavor to obtain employment after he was discharged, but with what result his testimony shows." To this charge the defendants' counsel excepted. A similar charge was given as to the rule of damages applicable to the case of Yager, and a similar exception taken.

It is not questioned that, had the action been brought after the expiration of the term, the rule of damages applied by the judge would have been correct, but it is insisted that, inasmuch as the action was brought before the expiration of the term, a different rule applies; that a servant who would recover as damages the entire amount of compensation stipulated for in the contract must wait until the expiration of the term before bringing his action. The plaintiff's cause of action arose at the time of the breach of the contract, and he was then entitled to sue and recover such actual damages as the evidence upon the trial showed he had sustained by the defendants' breach. It is the breach and not the time of complaining of it which gives the damage.

Lord MANSFIELD laid down the doctrine, "It is agreeable to principles of common law that whenever a duty has incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given on the action already pending." (Sedgwick on the Measure of Damages [1st ed.] 107.) In the authority last cited the rule is stated as follows: "If the original tort or breach of contract is such that the plaintiff would be entitled to nominal damages, then he can go on to give evidence of those consequences of the act which are immediately traceable to it, although they have taken place after the commencement of the suit." The same author in the sixth edition of the work, page

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122, says: "If there is a breach of contract the right to nominal damages exists at once to vindicate the right, and suit may be brought. If those consequences for which the law renders the party in default responsible have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of trial the loss is still only probable, the verdict should be for nominal damages." (See, also, *Wilcox v. Executors of Plummer*, 4 Peters, 172.)

We think the principle above stated is applicable to this case. The defendants owed a duty to the plaintiff and Yager from the time of the commencement of the action up to January 1, 1879, all of which was during the pendency of the *writ*, and for which satisfaction cannot be had except in this action. Where the cause of action is commenced during the term, but the trial occurs after the expiration of the term of service, we can see no reason why the plaintiff may not be permitted to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term.

The judgment should be affirmed, with costs.

All concur, except MILLER, J., absent.

Judgment affirmed.

In the Matter of the Petition of THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK to Vacate an Assessment.

Under the provision of the act of 1871 (§ 4, chap. 226, Laws of 1871), authorizing the commissioner of public parks of the city of New York "to fix and establish the grades of the streets" within a specified territory "where the same have not heretofore been fixed and established by law," not only were such grades excepted as had been fixed by legislative enactment, but also those lawfully established by ordinance of the common council.

The provision does not authorize a change of grade, but deals only with streets whose grades have not been lawfully established.

Where, however, it appeared, upon application to vacate an assessment, that

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the commissioner changed slightly the grade of a small section of a street, and that more than the increased cost of the improvement occasioned by the change was charged upon the city, because in excess of one-half the valuation of the property benefited, so that if the extra cost of the illegal work had been in the first instance, left out of the assessment, or should be deducted therefrom, the cost of work lawfully done would exceed the amount of the assessment. *Held*, that there was no substantial error, and that an order vacating the assessment was error.

The sidewalks of the street were laid but four feet wide. The ordinance, in general terms, directed that the sidewalks be flagged, without specifying the width. It was passed a short time prior to the passage of the city charter of 1873 (Chap. 885 of the Laws of 1873), which repealed the provision of the charter of 1870 (§ 1, chap. 883, Laws of 1870) requiring all flagging to be laid "full width," *i. e.*, twelve feet. It did not appear, however that the contract for the work was made before such repeal. *Held*, that the objection was untenable; that the burden was upon the petitioner to show substantial error, and this he failed to do, as it was entirely possible that the work was in violation of no existing statute applicable to it when done.

The construction gives to the act of 1871 below (*In re M. L. Ins. Co.*, 27 Hun, 22) overruled, although judgment is affirmed.

(Argued May 30, 1882; decided October 10, 1882.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 10, 1882, which reversed an order of Special Term vacating an assessment upon certain lots of the petitioner for regulating and grading One Hundred and Sixth street in the city of New York, from Third avenue to East river. (Reported below, 27 Hun, 22.)

The objections to the assessment are stated in the opinion.

Charles E. Miller for appellant. The grade according to which the work for which the assessment was imposed, having been illegally fixed, the assessment is void. (*People v. Haines*, 49 N. Y. 587; Laws of 1813, chap. 86, § 175; Laws of 1852, chap. 52; Laws of 1871, chap. 226.) The sidewalks are not flagged the width provided by law. (Laws of 1870, chap. 383, § 1, p. 884.)

J. A. Beall for respondent. The grade was lawfully changed in 1871. (Laws of 1871, chap. 226, § 4; Laws of 1867,

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chap. 580; Laws of 1870, chap. 593; Laws of 1873, chap. 335, §§ 9, 10, 12, 13, 14, 15, 16, 17, 29, 70, 91, 102, 111-115; Laws of 1872, chap. 580, §§ 1, 4, 7.) Substantial error is necessary to affect an assessment. (Laws of 1874, chap. 312; *In re Upson*, Ct. of Appeals MSS.; *In re Second Ave. M. E. Church*, 66 N. Y. 395.) Where four feet of flagging only has been laid and an assessment therefor imposed, the subsequent flagging to full width must be paid for by general taxation. (*In re Garvey*, 77 N. Y. 523; Laws of 1874, chap. 313; Laws of 1872, chap. 580, § 7.) Even if the change of grade of 1871 was made without adequate authority, the error is not such as to call for or authorize the vacation of the assessment, but presents a proper case for the reduction thereof in proportion to the unlawful increase. (Laws of 1870, chap. 383, § 27; *In re Merriam*, 84 N. Y. 596; *In re Hebrew Asylum*, 70 id. 476; *In re St. Joseph's Asylum*, 69 id. 353; *In re Auchmuty*, 18 Hun, 327; *In re Upson*, Ct. of Appeals, MSS.) As the several acts relative to proceedings of this character are intended to afford full and adequate relief, as in a proceeding in equity, it is clear that the petitioner has established no ground for such relief. (*In re Merriam*, 84 N. Y. 596-610; *In re Kendall*, 85 id. 303; *In re Pelton*, id. 651; *In re Upson*, Ct. of Appeals, MSS.; *In re N. Y. P. E. Pub. School*, 75 N. Y. 324; Laws of 1880, chap. 550.)

FINCH, J. The assessment which is assailed in this proceeding was levied to pay the expense of regulating and grading One Hundred and Sixth street, from Third avenue to the East river. The substantial error asserted is, that the work was done without lawful authority, and could not serve as the basis of a valid assessment. It is not questioned that the commissioner of public works had authority to regulate, curb, gutter and flag the street in question, upon the established and lawful grade. But he went beyond that limit. He changed the grade, and the first question presented is, whether this was rightfully done. The authority claimed is derived from the act of 1871. (Chap. 226, § 4.) That empowered the com-

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missioner "to establish and fix the grades of the streets extending to the East river north of East Fourteenth street, and east of First avenue, where the same have not heretofore been fixed and established by law." It is admitted that the grade of One Hundred and Sixth street had been "fixed and established" in 1853, by an ordinance of the common council, but it is claimed, and the General Term has so held, that the act of 1871 must be construed to except from the authority of the commissioner only such grades as had been fixed by an act of the legislature, and not such as had been established by ordinance of the common council. We cannot assent to this construction. The natural meaning of the act must be warped in order to justify it. It does not purport to authorize a *change* of grade. It deals only with streets whose grades had not been established, and where some authority must intervene to fix them for the first time. The authority to "fix and establish the grades" implies that such duty had not been done in the cases intended to be reached, and the meaning is made quite clear by the final words, "where the same have not heretofore been fixed and established by law." The commissioner could fix grades where none had been lawfully determined. Where they had been already established by competent authority, he was without power to make a change. An ordinance of the common council, regularly passed, and within the scope of the authority conferred upon it by the legislature, is a law. That it is local, and not general, in its operation does not alter its inherent character, or modify its binding effect. A grade fixed by such ordinance is fixed by law, and the act referred to cannot be justly construed to authorize a change by the commissioner of a grade already lawfully fixed. It is said, however, that this construction will make the authority conferred wholly without force or meaning, since the grades of every street within the described area had been previously fixed, either by the legislature or the common council. If such facts were fully established, we might be driven to the construction of the General Term, in order to give the act some possible application, but they were not proved or established on the

hearing, and are denied on the argument. Both sides refer to previous statutes, and to ordinances of the common council. It is impossible to say, without a very careful and laborious investigation, and with very inadequate means of reaching correct results, how the truth is. It may well be that the authority was given to cover an uncertainty, and reach a possible emergency. We remain of opinion, therefore, that the power of the commissioner to fix a grade was confined to cases in which no lawful grade had been already established, and that he changed the grade in the present case without lawful authority.

The consequence and effect of that error remains to be considered. Two things are said on behalf of the city: that no substantial error is shown; and that in any event the assessment should be reduced and not vacated. We must first be sure of the facts. The details of this improvement show three thousand eight hundred and sixty-three lineal feet of curb and gutter. As these were extended on both sides of the street, one-half of that amount, or nineteen hundred and thirty-one feet, appears to have been the total length of the improvement. Of this distance, all, except a space between First avenue and the East river, was regulated, curbed and guttered upon the lawful grade as fixed by the common council. Beyond First avenue and toward the river, the crown of the street was moved fifty-nine feet and six inches further east, the change apparently beginning one hundred and ninety-seven feet east of First avenue; the total additional rise at the new point of the crown being but seven inches, and at avenue A, on the bank of the river, but one foot. It is shown that this change required an excess of one thousand cubic yards of filling. The cost of the curb and gutter and of the flagging on the changed grade must have been so nearly the same with that required by the old grade, that any possible difference in those items is trifling and unimportant, and may be disregarded; and it thus becomes apparent, that all the excess of cost upon the changed grade was due to the additional filling, and was less than \$1,000.

The whole expense of the improvement was \$28,387.60. Of

this there was assessed upon the property benefited, \$27,378.18, and the balance of expense, being \$1,009.42, was charged upon the city because in excess of one-half of the valuation of the property benefited. It is thus apparent that if the extra cost of the illegal work creating the new grade had been in the first instance left out of the assessment, or is deducted from it now, there will remain work lawfully done, to an amount exceeding the assessment actually levied. In other words, the entire increased expense resulting from the unlawful work came upon the city and was borne by it, and the property owners were not compelled to pay any part of such excess. So that, whether the work of filling on this small section of the street was done lawfully or unlawfully, it in no manner altered the amount of the assessment upon the adjoining property. There is, therefore, no substantial error affecting the property owners, and they have suffered no injury from the unlawful act alleged, unless there is force in the further contention of the appellant that the assessment was for benefit upon the legal grade, and any deviation destroyed the whole assessment. That doctrine goes too far. The act of 1870 (Chap. 383, § 27), which allows a reduction in cases of unlawful increase of expense, and the decisions which have recognized and applied it (*In re Merriam*, 84 N. Y. 596; *In re Upson*,* MSS.), show very clearly that an unlawful increase of expense which can be accurately ascertained and separated from the general assessment, may be rejected, leaving the rest to stand; and does not necessarily drag down the whole assessment. The petitioner comes, alleging substantial error. To be such, he must have suffered an injury, and be able to show that in some manner he has been harmed and a substantial right has been invaded. This he does not show; what he complains of he has not been compelled to pay for; and he does not make it apparent that his benefit from the improvement is, or can be, any the less by reason of the slight and unimportant change of grade. He insists that we should infer such fact. There might be such a change of grade, so serious and important, evidently so affect-

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ing adjoining property, as to make the actual assessment inapplicable and entirely disarrange its basis. This is not such a case, and if, notwithstanding, the change made in truth affected the property differently from the authorized improvement, the petitioner should have proved the fact. The natural inference from the slight and unimportant change is the other way. Until injury is shown, the error is technical and not substantial.

The question raised as to the effect of laying the sidewalk four feet in width, instead of twelve, is also relied upon as a substantial error, for which the assessment should be vacated, or at least reduced. By section 1 of chapter 383 of the Laws of 1870, all flagging in the city of New York was required to be laid "full width," which is shown to be twelve feet. But this act of 1870 was expressly repealed, with the exception of two sections which do not touch the present inquiry, by chapter 335 of the Laws of 1873, passed April 30 of that year. The improvement of One Hundred and Sixth street was ordered by the common council a few months before that repeal, and on October 23, 1872. The ordinance directed in general terms that the sidewalks be flagged, and did not assume or purport to narrow the flagging. How soon thereafter the work began we do not know. But as contracts had to be made after an advertisement for proposals, and the final assessment for the completed work was not confirmed until 1875, it is probable that the contracts were made after the repeal of the act requiring the sidewalks to be of full width. At all events the burden is on the petitioner to show substantial error, and he fails to do so when he leaves it entirely possible that the work which he assails was lawful, and in violation of no existing statute applicable to it when done.

For these reasons we think the order of the General Term should be affirmed, with costs.

All concur, except TRACY, J., absent.

Order affirmed.

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JACOB B. TALLMAN, Respondent, v. JOHN HOEY, Appellant.

A valuable consideration is an essential and necessary element of an equitable assignment, and to make an order or direction to pay effectual as an assignment, it must appear that such a consideration was paid therefor.

(Argued June 6, 1882 ; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made February 7, 1881, which affirmed judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover a balance of the purchase-price of certain premises conveyed by plaintiff to defendant.

Defendant admitted that the balance claimed was unpaid, but set up as a counter-claim an indebtedness of plaintiff to one Lynch, a real estate broker, for commissions in effecting a sale of the premises, and an assignment of the claim to defendant. On the trial defendant gave in evidence the following instrument :

EXHIBIT I.

“ J. B. TALLMAN :

“ Please pay to Mr. John Hoey, or bearer, \$850 ; being amount of commissions due me on sale of 624 Fifth ave.

“ N. Y., Jan'y 18, '72.”

“ M. A. J. LYNCH.”

It did not appear that defendant was indebted to Lynch at the time of the delivery of said instrument to him, or that he paid or parted with any thing on receipt thereof.

Charles Edward Souther for appellant. It was error to withhold from the jury a consideration of the counter-claim, there being evidence on both sides to support it. (*Morton v. Naylor*, 1 Hill, 584 ; *Hall v. City of Buffalo*, 1 Keyes, 195 ; *Shuttleworth v. Bruce*, 7 Rob. 160 ; *Ballou v. Boland*, 14 Hun, 359 ; *Brill v. Tuttle*, 81 N. Y. 454.) The law presumes the assign-

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ment to have been upon a good consideration until the contrary appears affirmatively. (*Belden v. Meeker*, 47 N. Y. 311; *James v. Chalmers*, 6 id. 209.) It was not open to the plaintiff to dispute the consideration. (*Mills v. Fox*, 4 E. D. Smith, 223; *Petersen v. Chemical Bk.*, 32 N. Y. 47; *Hays v. Haythorn*, 74 id. 489, 490; *Stone v. Frost*, 61 id. 615; 2 Story's Eq. Jur., § 1057; *Freeman v. Falconer*, 45 N. Y. Supr. Ct. 383.) Considering the transaction as an equitable assignment, it was irrevocable in equity as soon as it was delivered to the holders, and at law as soon as it was assented to by the defendant, so far as to require him to appropriate so much of the profits as were equal to the amount of the note, to its payment. (*Munger v. Shannon*, 61 N. Y. 258; *Menony v. Ferrers*, 3 Johns. 71-83; *Peyton v. Hallett*, 1 Caines, 353; *Canfield v. Monjer*, 12 Johns. 346; 2 Story's Eq. Jur., § 1044; *Wylie v. Marine Bk.*, 61 N. Y. 416.) Payment could not be rightly made by plaintiff after notice to him that the claim had for what it was worth been transferred to the defendant. (*Mandeville v. Welch*, 5 Wheat. 277; 2 Story's Eq. Jur. [12th ed.], §§ 1040, 1055; *Brill v. Tuttle*, 81 N. Y. 457; 1 Keyes, 199; *Crocker v. Whitney*, 10 Mass. 319; *Cutts v. Perkins*, 12 id. 211.)

William Allan for respondent. The order given to defendant, by Mr. Lynch, on plaintiff, for payment of his commissions, is a bill of exchange. (Chitty on Bills, 55; *Cook v. Satterlee*, 6 Cow. 108; *Leonard v. Mason*, 1 Wend. 522; *Enricks v. DeMill*, 75 N. Y. 373; *Britt v. Russell*, 81 id. 454; *Atty.-Gen. v. Cont. L. Ins. Co.*, 71 id. 325; 3 R. S. [Banks' 5th ed.] 68, § 6; *Munger v. Shannon*, 61 N. Y. 251, 255.) The order denying a new trial, upon the ground of surprise, is not reviewable in this court. (*Sheldon v. D. & H. C. Co.*, 29 N. Y. 634; *Bedell v. Chase*, 34 id. 338; *Lawrence v. Ely*, 38 id. 42; *Tracy v. Altmeyer*, 46 id. 598; *Scoville v. Langdon*, 50 id. 687.) There being no evidence to show that defendant was a creditor of Lynch, there was no fund to appropriate to a creditor. (*Munger v. Shannon*, 61 N. Y. 258.) The right to allow further evidence, after a case is deliberately submitted, or to allow a party to withdraw a juror, is one of judicial discre-

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tion. (*Ruggles v. Hull*, 14 Johns. 112; *Colton v. State*, 4 Tex. 260; *Tilden v. Gardner*, 25 Wend. 633; *Sproule v. Resolute Fire Ins. Co.*, 1 Lans. 71; *Oakley v. Lewis*, 7 Rob. 111; 3 Wait's Pr. 401; *DeLeyer v. Michalis*, 5 Abb. 203; *Jackson v. Roe*, 9 Johns. 77; *People v. Marks*, 10 Hun, 297; *Taylor v. Marlen*, 11 How. 285; *Meakin v. Anderson*, 11 Barb. 216.) The absence of a material witness is not a ground for a new trial. (*Post v. Wright*, 1 Caines, 111.)

FINCH, J. The instrument which is the subject of this litigation is described by the plaintiff as a bill of exchange; and claimed by the defendant to operate as an equitable assignment of the commissions alleged to have been earned by Lynch and due from the plaintiff. If a bill of exchange, Tallman could not be made liable for want of acceptance in writing. If the holder can enforce it at all, it must be upon the ground of an equitable assignment. But the circumstance which justifies and induces that equitable construction which treats as an assignment what is not strictly and legally such, is the existence of a valuable consideration for the imperfect transfer. (*Brill v. Tuttle*, 81 N. Y. 457.) It proceeds upon a necessity demanded by the justice of the case, and to obviate an injury or a wrong which would otherwise occur. Where the holder has parted with nothing, and so loses nothing by the application of ordinary legal rules, no pressure of justice requires the intervention and the help of an equitable doctrine. And so it follows that, conceding the order to have been drawn on a particular fund (*Att'y-Gen'l v. Continental Life Ins. Co.*, 71 N. Y. 325; 27 Am. Rep. 55), yet the presence of a valuable consideration upon which the order, or direction to pay, was founded, becomes the essential and necessary element of an equitable assignment. That element is wanting in the present case. It is claimed, however, to be supplied by a legal presumption. It is undoubtedly true that where an actual assignment exists it is presumed, in the absence of proof of the facts, to have been made upon adequate consideration. (*Belden v. Meeker*, 47 N. Y. 311.) But here no actual assignment was

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ever executed. The equitable rule which transforms a mere order into an assignment is brought into play by a just necessity, existing and established, and not by a mere possibility or presumption. But in the case at bar the facts proven repel any such presumption. Not only did both Lynch and Hoey, when upon the witness stand, fail to assert any consideration passing between them for the order on Tallman, but Lynch tells us substantially the contrary. He says that if the order was not paid he expected to get his commissions of Tallman, and afterward did settle with him for them as the real owner to whom they were due. These facts indicate that the order was without actual consideration; that it was held by Hoey merely for collection as the agent and on behalf of Lynch; or at most was an unexecuted and imperfect gift. In neither event could the doctrine of equitable assignment apply. We discover no ground upon which the counter-claim pleaded can rest; and the plaintiff's cause of action for the balance of purchase-money being conceded, a recovery for that was properly allowed.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

SAMUEL WELSH et al., Appellants, v. JOHN H. GOSSLER et al.,
Respondents.

Defendants, who were doing business in New York, contracted with one F. to sell him a quantity of sugar to be sent from St. Vincent, and to be "May-June shipment." The purchase-money to be paid at the port of departure. F. thereupon applied to plaintiffs for, and received from them, a letter of credit to their correspondents in London, which, by its terms, expired unless used before June 30, and required a May or June shipment, and bills of lading to plaintiffs' order; this was delivered by F. to defendants; at defendants' request a credit by telegram was substituted, the form and language of which was dictated and proposed by defendants. It contained no prohibition as to use later than June. No change, however, was made in the original contract. No shipment of

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sugar was made until July, when a cargo was shipped the bills of lading being made to plaintiffs, and the credit was used therefor. On arrival of the sugars at New York, F. refused to receive them, because not shipped in compliance with the contract. Plaintiffs thereupon notified defendants that they could not receive them for F., and offered to surrender them upon payment of the advances. Upon their refusal to take them, and after due notice, plaintiffs sold the sugars. In an action to recover the balance of the advances after application of the proceeds of sale, *held*, that F. was not bound to accept sugars shipped in July; that neither defendants nor their representatives at St. Vincent acquired a right to use the credit after June 30, although the form of the telegraphic credit enabled them to do so; that in substance and effect defendants took plaintiffs' money as a forced loan or advance upon the consignment of the sugars to be sold on commission on their account; that plaintiffs therefore were entitled to recover, and a nonsuit was error.

Welsh v. Gossler (15 J. & S. 104), reversed.

(Argued June 12, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the February term, 1881, which affirmed a judgment in favor of defendants, entered upon an order nonsuiting plaintiffs upon trial. (Reported below, 15 J. & S. 104.)

This action was brought to recover an alleged balance due for moneys had and received.

The material facts are stated in the opinion.

Edward Patterson for appellants. The defendants, having failed to perform their contract with Finlay, discharged him from his obligation to take the goods. (*Bowes v. Shand*, L. R., 5 H. of L. 28; Benjamin on Sales, *passim*; *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J. Exch. 73; *Catlin v. Tobias*, 26 N. Y. 217; *Rouse v. Lewis*, 2 Keyes, 352; *Russell v. Nicholl*, 3 Wend. 112.) He was entitled to consider that the defendants, by their non-performance, had themselves rescinded the contract. (*Seipel v. Int. Life Ins. Co.*, 84 Penn. St.) Plaintiffs' special agency was to accept for Finlay "May ^{or} _{and} June shipments," and they could not bind him by accepting any thing else. (*Nixon v. Palmer*, 4 Seld. 398; *East India Co. v. Hensley*, 1 Esp. 11; *Rossiter v. Rossiter*, 8 Wend. 498.) Pay-

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ment by Kleinworth, Cohen & Co. of D. K. Porter & Co.'s drafts was payment to the defendants. (*Blackman v. Thomas*, 28 N. Y. 67.) The defendants, in using that letter of credit, could not put the plaintiffs in any other or less advantageous position as to the merchandise, than they would have been in had it been used for Finlay's purchase. (*Atlantic Dry Dock Co. v. Leavitt*, 50 Barb. 135; *Hendricks v. Judah*, 2 Caines, 25; *Bartlett v. Crozier*, 17 N. Y. 439; *Frost v. Ins. Co.*, 5 Denio, 154; Abbott on Shipping [5th ed.], 286; *Lucas v. Trockells*, 1 Cl. & F. 457.) The plaintiffs, therefore, received, and were entitled to receive, the goods as commission merchants, as that was the capacity, or relation, in which they issued the credit; and that credit attracted to it, when used, the goods shipped pursuant to its requirements. (*Cayuga Nat. Bk. v. Daniels*, 47 N. Y. 636; *Farmers, etc., Bk. v. Logan*, 74 id. 579; *Gihon v. Stanton*, 9 id. 481; *Brown v. McGraw*, 14 Peters, 479; *Marfield v. Goodhue*, 3 Comst. 62; *Hidden v. Waldo*, 55 N. Y. 294.) A pledgee can recover a balance of his debt, even though he was in fault in selling the subject of the pledge. (*Duden v. Wartzfelder*, 16 Hun, 339; *Gourman v. Smith*, 81 N. Y. 25.) Defendants, having received the plaintiffs' money, and having furnished merchandise insufficient in value to cover the amount drawn upon the letter of credit, the law implies a promise to pay the deficiency. (*Byxbie v. Wood*, 24 N. Y. 610; *Gihon v. Stanton*, 9 id. 482-3; *Pierce v. Crafts*, 12 Johns. 90; *Tiernan v. Jackson*, 5 Peters, 597; *Neilson v. Blight*, 1 Johns. Cas. 205; *Mason v. White*, 17 Mass. 560; *Fleming v. Alter*, 7 S. & R. 295.) It is immaterial what designation is given to the action. (*Briggs v. Cent. N. Bk.*, 61 How. Pr. 256; *Bradley v. Aldrich*, 40 N. Y. 504.) A sufficient tender back of the goods was made. (*Wheelock v. Tanner*, 39 N. Y. 486; *Sandford v. Travers*, 7 Bosw. 508.)

S. Sidney Smith for respondents. There was a sufficient tender of performance by defendants and acceptance by plaintiffs. (*Cobb v. Hatfield*, 46 N. Y. 533, 536, 537; *Goelth v. White*,

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35 Barb. 76; *Dounce v. Dows*, 64 N. Y. 416.) Plaintiffs, by refusing to give up the sugars without being indemnified by afterward entering, dealing with and selling them, accepted them as in compliance with the terms of their contract, and they cannot now claim otherwise. (*Chapman v. Morton*, 11 M. & W. 534; *Cobb v. Hatfield*, 46 N. Y. 533, 536, 537; *Street v. Blay*, 2 B. & A. 456, 463; *Cornwal v. Wilson*, 1 Ves. Sr. 509; *Masson v. Bovet*, 1 Denio, 69; *Pomeroy v. Shaw*, 2 Daly, 267; Benjamin on Sales [1st Am. ed.], 703; *Horncastle v. Farran*, 3 B. & A. 497; *Campbell v. Fleming*, 1 A. & E. 40; *S. C.*, 3 N. & M. 834; *Voorhees v. Earl*, 2 Hill, 288; *Bogan v. Weyer*, 5 id. 389; *Van Epps v. Harrison*, id. 66; *Ross v. Litterton*, 6 Hun, 280; *Dows v. Griswold*, 4 id. 550; *Sprague v. Baker*, 20 Wend. 61; *McCrillis v. Carlton*, 37 Vt. 139; *Peters v. Gooch*, 4 Blackf. [Ind.] 515; *Downer v. Smith*, 32 Vt. 1; *Wheaton v. Baker*, 14 Barb. 594; *Moyer v. Shoemaker*, 5 id. 319; *Clark v. Baker*, 5 Metc. 452-461; *Stevens v. Hyde*, 32 Barb. 171, 182; *Shields v. Petrie*, 2 Sandf. 262-8; affirmed, 4 Comst. 122; *Mansfield v. Trigg*, 113 Mass. 354; *Lindsay v. Ferguson*, 3 Alb. L. J. 211; *Matteawan Co. v. Bentley*, 13 Barb. 641-4; *Goelth v. White*, 35 id. 76; *Springer v. Dwyer*, 58 id. 189-193; 50 N. Y. 19; *Clarkson v. Cunningham*, 4 Mass. 502; *Sinclair v. Neill*, 1 Hun, 80, 82; *Farrell v. Corbett*, 4 id. 128; *Milner v. Tucker*, 1 C. & P. 15; *Kimball v. Cunningham*, 4 Mass. 502; *S. C.*, 3 Am. Dec. 230; (*Clark v. Dickson*, 1 E. B. & E. 148.) To make a tender valid, it must be made without the imposition of any condition, restriction or qualification whatever. (*Roosevelt v. Bull's Head Bk.*, 45 Barb. 579; *Wood v. Hitchcock*, 20 Wend. 47; *Cashman v. Martin*, 50 How. Pr. 337; *Hicksville & Cold Spring B. R. R. Co. v. L. I. R. R. Co.*, 48 Barb. 355; *Wilder v. Seeley*, 8 id. 408.) A tender must be kept good. If after it be made the party uses the property in his business, the tender is not valid. (*Stevens v. Hyde*, 32 Barb. 171, 182; *Roosevelt v. Bull's Head Bk.*, 45 id. 579.) An action for money had and received will not lie where the contract has been partially executed; in such a case the plaintiffs must resort to

their action for damages. (*Stevens v. Cushing*, 1 N. H. 17; *S. C.*, 8 Am. Dec. 47; *Peters v. Gooch*, 4 Blackf. [Ind.] 515; 1 Chitty's Pl. [16th Am. ed.] 923; *Clarke v. Dickson*, 1 E. B. & E. 148; 2 Pars. on Cont. [6th ed.] 679, 680; *McCrillis v. Carlton*, 37 Vt. 139; *Wheaton v. Baker*, 14 Barb. 594; *Moyer v. Shoemaker*, 5 id. 319.) The last letter of credit was a written paper complete in itself, and must be deemed to have superseded all that went before. (*Hill v. S. B. & N. Y. R. R. Co.*, 73 N. Y. 352; *Germania Fire Ins. Co. v. Memphis & C. R. R. Co.*, 72 id. 90.) The plaintiffs cannot recover unless they show that the moneys received were received to their use. (2 Chitty on Cont. [11th Am. ed.] 899; 1 Chitty's Pl. [16th Am. ed.] 367; *Sup'rs of Dutchess v. Sisson*, 24 Wend. 387; *De Peyster v. Winter*. 4 How. Pr. 449.)

FINCH, J. Reflection and study have changed our first impressions of this case, and led us to the conclusion that the non-suit was improperly granted, and the plaintiffs should have recovered. The facts which seem complicated are not really so, and create no difficulty when accurately understood.

The defendants, Gossler & Co., doing business in New York, entered into an agreement with one Finlay to sell him a quantity of sugar, to be sent from St. Vincent, and to be "May-June shipment." The purchase-money was to be paid at the port of departure, and to accomplish this, Finlay applied to the plaintiffs for a letter of credit to their correspondents in London, through whom the funds could be transferred to St. Vincent, and used to pay for the sugar. The plaintiffs gave Finlay the desired letter of credit, who in turn delivered it to Gossler & Co. as a means of payment for the purchase. By its terms this credit expired, unless used, on June 30. It also required a May or June shipment, and bills of lading to the order of the plaintiffs. The letter of credit harmonized with the contract, and by its express terms would have been unavailable for any shipment later than June 30. But at the request of Gossler & Co. a credit by telegraph was substituted in its place, the form and language of which was dictated and

prepared by them. That credit was sent forward. The necessary brevity of the dispatch excluded details, and it contained no prohibition of a use later than June. It is not pretended that the terms of the contract between Gossler & Co. and Finlay were at all changed. It was still a May-June shipment which the latter was to receive, and for which alone the credit was to be used to pay. What had happened was only this: that the form of the telegraphic credit enabled Gossler & Co., or their representatives in St. Vincent, who were to ship the sugar on their behalf, to use the credit after June 30, and for a later shipment. They gained no right to do so, but found in the form of the order an opportunity and a possibility of getting the money upon an unauthorized delivery. That is exactly what they did. June went by without any shipment. The right to utilize the credit upon the contract was gone. The money it represented was no longer Finlay's, unless by his further choice. He ceased to be liable for it under the contract. He had not used the credit so as to become liable, and no one was authorized to use it for him upon a new and different contract. The money, therefore, on the morning of July 1 was not Finlay's, and could not be applied on a succeeding shipment on his account. It was solely and only the money of the plaintiffs, to be returned to them by the cancellation of an unused credit, and for which no lawful use remained, since the contract for which it was issued had expired, and was dead. For it is not to be doubted that Finlay was not bound to accept or pay for sugars shipped in July. (*Russell v. Nicoll*, 3 Wend. 112; *Catlin v. Tobias*, 26 N. Y. 217; *Rouse v. Lewis*, 2 Keyes, 352.) Now Gossler & Co. were the vendors of the sugars, and the letter of credit when made was delivered upon their direction, and when paid was a payment to them. They dealt as principals, disclosing no agency, and indicating the existence of none. The written contract shows them to have been the vendors, and no pretense of any agency appears in the transaction until one of the defendants was sworn on the trial. While he testifies that they were not the owners in fact of the sugars, they must be treated as such as between themselves and

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Finlay on the one hand, and the plaintiffs on the other, since to neither did they assume any other position than that of owners and principals. The letter of credit was delivered to them; the telegraphic credit was sent upon their order and to their appointees; and the latter, in dealing with it, must be deemed the agents of the defendants, acting on their behalf and responsibility. What then did these agents or appointees do with the funds placed within their reach? They appropriated them to a July shipment. Through them Gossler & Co. took the funds in payment for July sugars. In substance they took the money of plaintiffs upon a forced loan or advance, without right or lawful authority, and shipped to the plaintiffs the sugars with bills of lading to their order. The transaction at this point was one of two things. Finlay might accept the sugars notwithstanding the delay. He might waive the provision of the contract which required a June shipment. If he did, the appointees of Gossler & Co. were rightfully in possession of the money as paid upon the latter's contract of sale. But if he did not, if he refused to accept, and stood upon the terms of the contract, then Gossler & Co. were in the position of appropriating plaintiffs' money as a loan or advance upon the faith of the sugars shipped to the plaintiffs to sell on commission. Putting one side Finlay's contract as no longer existing, the agents and appointees of Gossler & Co. could not take the money as Finlay's, or under his contract. They could only take it as plaintiffs' money, and as an advance upon a consignment of the sugars to them to be sold on commission. With the end of Finlay's contract the facts raised a new contract, and created a new relation between Gossler & Co. and the plaintiffs, upon which the rights of the latter can rest. Two cases to which our attention is specially directed by the learned counsel of the respondents tend to sustain the view we have thus taken of the relation of the parties. In *Cornwal v. Wilson* (1 Vesey, Sr., 509), the defendant, a merchant in London, sent orders to the plaintiffs in Riga to buy for him as his factors, a quantity of hemp at a fixed and limited price. The plaintiffs exceeded their authority and bought at a larger price. On the

arrival of the hemp the defendant refused to receive it under his contract, but did take it and dispose of it. Lord HARDWICKE said: "That a merchant here refusing goods sent over by his factor in a foreign country, who exceeded the authority, having advanced and paid his money on these goods, may be considered as having an interest as a pledge, and may act thereon as a factor for that person, who broke his orders." The chancellor then held that defendants did not act as factors, although they might have done so, because instead of selling the hemp as factors and in the customary way, they took the risk of transporting the hemp to Portsmouth, and selling it there. Upon the doctrine of this case, if the sugars had been shipped to Finlay who had made advances, the latter might have refused them under the contract, but received them, and sold them on commission as factor of the shippers. Much stronger is the case as applied to the present plaintiffs. They had made no contract of purchase. Finlay had refused to receive the property, and forbidden them to accept it for him. They could not, and they did not, receive the sugars on his behalf. They expressly so declared. They could receive them, however, as factors for Gossler & Co., and to sell on commission. Just that they did. They explained their attitude carefully. They gave Gossler & Co. in their character of shippers and owners opportunity to take the whole cargo, and sell it themselves upon repaying the advances. Upon their refusal the plaintiffs sold the goods in the usual and ordinary way, as commission merchants, applied the proceeds upon the advances, and now call upon the shippers for the unpaid balance. The other case referred to is that of *Chapman v. Morton* (11 M. & W. Exch. 534). The sale by the purchaser who repudiated the contract in words was held on all the facts to have nullified his refusal. Lord ABINGER admitted that the act of sale was in itself equivocal. PARKE, B., stated its equivocal character more strongly, saying: "There might be circumstances under which he might have disposed of the goods as agent of the vendor; but it might be also that he meant to take the property, having recourse to his cross remedy." In the present case the sale by

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the plaintiffs was in no respect an equivocal act. Finlay had refused to accept; and they had refused to accept for him. No contract of sale and purchase remained. The omission to ship in June authorized Finlay to treat it as rescinded. (*Seipel v. Int. Life Ins. & Tel. Co.*, 84 Penn. St. 47; *Graves v. White*, 87 N. Y. 463.) Nothing remained except the facts of the advances made by plaintiffs *in invitum* and against their wish, the shipment of sugars to them as commission merchants having a lien upon the proceeds for their reimbursement, and their sale accordingly.

The error of the courts below thus becomes apparent. Their conclusion went upon the ground that plaintiffs received and sold the goods as agents of Finlay, and, therefore, they could not rescind the contract without an unconditional offer to restore the sugars. We think the contract was already rescinded by the act of the defendants; that the plaintiffs did not receive the goods as agents of Finlay, since that had become impossible, and was expressly refused; and that they did receive them upon commission, and upon a new contract of that character between themselves and the defendants, springing up from and growing out of the facts and circumstances of the shipment and advances.

It follows from these views that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

In the Matter of the Petition of JOHN LOWDEN to Vacate an
Assessment.

The scheme of sewer improvements in the city of New York contemplates that the whole expense should be borne by the property benefited. Engineers' and surveyors' fees are properly included in an assessment for such an improvement, as an item of the expenses, and although the mode of ascertaining may not give the exact cost of this item, if it approximates thereto and the charge does not appear to be in excess of the sum

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properly chargeable to the work, it is not a tenable objection to the assessment.

Nor is it a valid objection that the engineers by whom the work was done were already in the employ of the city, under a salary which had been paid.

When, therefore, an assessment for such a work included an item for engineers' and surveyors' fees, which was made under the supervision of the chief engineer of the bureau of sewers, and was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to the sewerage of the city done during the year, as would remunerate the city for the moneys paid for engineers' expenses; *held*, that in the absence of evidence that the share imposed upon the petitioner was enhanced, or that this item of expense could be arrived at in a way better or more just to him and the public it was properly included.

The statutes in relation to assessments for such improvements provide for sufficient notice and hearing to persons affected by an assessment to meet the constitutional requirements.

Where the published notice required objections to an assessment to be presented to the "board of assessors," instead of to the chairman of that board as prescribed in the act of 1841 (§ 1, chap. 171, Laws of 1841), *held*, that the variance was immaterial, as the objections, if any were made, were for the board, not for its chairman alone, to consider.

In re Lowden (25 Hun, 434), modified.

(Argued June 18, 1882; decided October 10, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 28, 1881, which affirmed an order of Special Term denying a motion to vacate an assessment upon certain lots of the petitioner in the city of New York, for the First avenue sewer, but reducing the assessment by deducting a proportionate share of an item for surveyor's fees, included in said assessment. (Mem. of decision below, 25 Hun, 434.)

The grounds of objection, and the facts pertaining thereto, are stated in the opinion.

Moody B. Smith for appellant. An assessment is in the nature of a judgment. (*Mayor v. Colgate*, 12 N. Y. 140.) Chapter 171, Laws of 1841, chapter 308 of the Laws of 1861, and chapter 580 of the Laws of 1872, are unconstitutional and void,

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so far as they make no provision for notifying the owners of property affected by the assessment of the time and place of the meetings of the board of assessors, or the board of revision and correction of assessments. (Cooley on Taxation, 266; *Seifert v. Brooks*, 34 Wis. 443; *Jordan v. Hyatt*, 3 Barb. 275; *Elmendorf v. Harris*, 23 Wend. 628.) An assessment is a judicial proceeding, and cannot be laid without a trial or hearing provided by law. (Cooley on Taxation, 40, note, 550, 551; Blackwell on Tax Titles, 26; *Western R. R. Co. v. Nolan*, 48 N. Y. 514; *Stewart v. Palmer*, 74 id. 183, 190; *Davidson v. Bd. of Admrs. of New Orleans*, 6 Otto, 97; *Ireland v. City of Rochester*, 51 Barb. 414; *In re Ford*, 6 Lans. 92; Cooley on Constitutional Limitations, 355; 68 N. Y. 97; Blackwell on Tax Titles, 26; Cooley on Taxation, 265, 266; *Stewart v. Palmer*, 74 N. Y. 183, 189, 191; *People, ex rel. Witherbee, v. Suprs.*, 70 id. 234; *In re N. Y. El. R. R. Co.*, id. 327, 357; *Werner v. Bunbury*, 30 Mich. 201, 213; *Harris v. Wood*, 6 Monr. 642, 643; *Nashville v. Weiser*, 54 Ill. 245; *Seifert v. Brooks*, 34 Wis. 443; *Willard v. Witherby*, 4 N. H. 118.) This assessment is also invalid for the reason that the notice to present objections in writing given to parties affected by the assessment does not comply with the statute. (Laws of 1841, chap. 171, § 1; *Adriance v. McCafferty*, 2 Robt. 153; *In re Cameron*, 50 N. Y. 503; *Commrs. of Pilots v. Vanderbilt*, 31 id. 265.) It is illegal to assess the cost of surveying and engineering of a public work where such surveying and engineering were performed by the city engineer, and his assistants, who are officers of the city, and are paid a fixed salary. (*Longworth v. Cincinnati*, 34 Ohio St. 101.)

J. A. Beall for respondent. A tax or assessment may be laid without first affording the party assessed a hearing in the judicial sense of that term. (Laws of 1691, chap. 18; 1 Van Schaack's Laws, 8; 1 Livingston and Smith, 8; Bradford, 12; 4 N. Y. 438; Laws of 1787, chap. 88; 1 Greenleaf's Laws, 441; chap. 129, Laws of 1801, §§ 11, 12; 2 K. & R. 126; chap. 86, 2 R. L. 1813, § 175; chap. 49, Laws of 1824;

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chap. 326, Laws of 1840, § 2; chap. 171, Laws of 1841, § 1; chap. 302, Laws of 1859, §§ 15, 16, 17, 18, 19; chap. 308, Laws of 1861, § 1; chap. 580, Laws of 1872, § 6; chap. 335, Laws of 1873, § 111; chap. 381, Laws of 1865, § 6; chap. 338, Laws of 1858; chap. 383, Laws of 1870, § 27; chap. 312, Laws of 1874, § 1; *People v. Mayor of Brooklyn*, 4 N. Y. 419, 438; *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. [U. S.], 272, 276, 277; *Taylor v. Porter*, 4 Hill, 140; *Harris v. Wood*, 6 Monr. 642-643; *McMillen v. Anderson*, 95 U. S. 34-41, 42; *Weimer v. Bunbury*, 30 Mich. 201-211; *Davidson v. New Orleans*, 96 U. S. 105; *Stuart v. Palmer*, 74 N. Y. 183-204; *Matter of Trustees N. Y. P. E. Public School*, 31 id. 574, 583-584; Cooley on Taxation, 33, 39; *Hardenburgh v. Kip*, 10 Cal. 402; Burroughs on Taxation, § 145, pp. 463-4; *Weimer v. Bunbury*, 30 Mich. 201, 210, 213; *Willard v. Witherbee*, 4 N. H. 118-127; *Comm. v. Runk*, 26 Penn. St. 235; 80 N. Y. 565.) The law does, in fact, provide an opportunity for the persons affected by the assessment to be heard before its confirmation, and the notice to present objections required by the law was given. (Chap. 326, Laws of 1840, § 2; chap. 171, Laws of 1841; chap. 335, Laws of 1873, § 111; chap. 580, Laws of 1872, § 6.) The notice of hearing prescribed by the statute is sufficient. (*Tracy v. Corse*, 58 N. Y. 151-2; *Happy v. Mosher*, 48 id. 317; *Campbell v. Evans*, 45 id. 356; *In re DePeyster*, 80 id. 565; *Owners of Ground v. Albany*, 15 Wend. 375-6; *Taylor v. Porter*, 4 Hill, 147; *In re Empire City*, 18 N. Y. 215; *In re N. Y. El. R. R. Co.*, 70 id. 357; *Stuart v. Palmer*, 74 id. 183.) The charge for surveyors' fees is properly included in the assessment list. (Chap. 381, Laws of 1865, §§ 9, 10, 11, as amended by chap. 551, Laws of 1866, § 1; *In re Eager*, 46 N. Y. 100; *In re Merriam*, 84 id. 596; *In re Pelton*, 85 id. 651; *In re Bassford*, 50 id. 509; *In re Roberts*, 81 id. 62-68; *In re Hebrew Asylum*, 70 id. 476.)

DANFORTH, J. Lowden, by his petition to the Supreme Court, showed that he was the owner of certain lots affected

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by an assessment laid June 5, 1879, for the construction of a sewer in First avenue in the city of New York, and complained that it was irregular for the following among other reasons:

First. Because it included an item for surveyors' and engineers' fees, "whereas," he says, "no such amount was incurred or expended by the department of public works or its predecessors, which could properly be chargeable to said assessment." *Second.* Because no legal trial or hearing is provided by law or was had by the parties assessed, whereby they could contest the validity of said assessment before it was confirmed, before a tribunal authorized to try such issue," and asked that the assessment be vacated.

Upon the hearing it appeared that the whole assessment amounted to \$141,252.28, and included an item of \$9,078 for surveyors' fees. It appeared from the evidence that this item was made up under the supervision of the chief engineer of the bureau of sewers, and included all the engineer's expenses incidental to the construction of the sewer. He was unable to state the separate items, but said the sum was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to sewerage of the city done during the year, as would remunerate the city for the moneys advanced for engineers' expenses, making of maps, plans and surveys. It covered the surveys necessary to complete the general plan of the district, a detailed survey of the streets and avenues through which sewers were to be built, a plan of the work referred to in the contract, "staking out the work for the construction of the sewer, giving necessary grades, comparing the sewer when built with the grades given for its construction, preparation of the contract, measurements for monthly payments to the contractor, and the final and conclusive survey of the whole sewer. Other items are given in great detail, and in the opinion of the witness the proportion charged to the land of the petitioner was a fair charge for services of this nature performed on the work in question.

The engineers were employed at a certain fixed salary, which had already been paid from moneys advanced from the finance

department in view of collecting the amount from the property. It also appeared that on the 15th of April, 1879, a notice dated that day was given by publication in the "City Record" of the assessment in question, and thereby all persons were directed "to present their objections in writing to the board of assessment at their office, No. 114 White street, within thirty days from its date, and that on the 15th day of May the list would be transmitted to the board of revision and correction of assessments, for confirmation. The petitioner neither filed objections nor appeared before the board of revision and correction.

The court at Special Term denied the order asked for, but directed the assessment, so far as it related to the petitioner, to be reduced by deducting a proportionate part of surveyors' fees. From different portions of this order the petitioner and the mayor, etc., of New York city severally appealed to the General Term. The order was in all its parts affirmed, and both parties appeal to this court, the mayor, etc., from the whole order, and the petitioner from that part relating to the refusal of the Special Term to vacate the assessment.

First. We think so much of the appeal in behalf of the city as relates to the disallowance of surveyors' fees is well taken. The petitioner does not object that the assessment may not properly include surveyors' fees. In view of the suggestion of this court in *Matter of Merriam* (84 N. Y. 596), and its decision in *Matter of Pelton* (85 id. 651), such objection would be of no use; but he objects that it does not appear that the sum named "was expended for that purpose." It is not apparent that there is any other prescribed method of arriving at the amount of these assessments. Indeed it appears from the evidence that there is no other mode. A comparison of the case in hand with *Matter of Pelton* shows that upon this point the cases are alike. We there held, upon evidence quite like that now before us, "that although the mode of ascertaining these expenses may not produce the exact cost of this item of work," yet as it approximates thereto, and the charge did not appear to be in ex-

cess of the sum properly chargeable to the work, the objection was not tenable.

Nor does it appear, in the case before us, that the share imposed upon the petitioner was exaggerated, or that under the system of public improvement imposed by law upon the property owner in the city of New York, it could be admeasured in any better way, or one more just to him or the public. The fact that the engineers by whom the work was done were already in the employ of the city is relied upon by the petitioner to distinguish this case from *Matter of Pelton*. It might be inferred from the evidence that the same fact appeared there, but, however that may be, the scheme of sewer improvements contemplates that the whole expense should be borne by the property benefited, and no part of it by the city. (*In re Eager*, 46 N. Y. 100.) And whether the service is rendered by an engineer employed for the special work, by the department in charge of it, or by one employed by the city generally, can in nowise affect the burden imposed upon the lot-owner.

I have not overlooked the case of *Cincinnati & S. R. R. Co. v. Longworth* (30 Ohio St. 105), cited by the petitioner. It involved the construction of a municipal regulation, but whether it is the same as the one before us does not appear. However that may in fact be, the practice approved in *Matter of Pelton* and *Merriam* (*supra*) seems to have been generally followed under the statutes regulating local improvements in the city of New York, and it may properly be upheld.

Upon the petitioner's appeal, the point chiefly argued by him is that the statute in regard to assessments gave no opportunity to the property owner to be heard with reference to its imposition. In substance, that his property was liable to be taken without *due process of law*. But this question has been so frequently decided in a manner unfavorable to his contention that it would be idle to enter upon its discussion. (*People, ex rel. Griffin, v. Mayor of Brooklyn*, 4 N. Y. 419; *People, ex rel. Crowell, v. Lawrence*, 41 id. 137; *In re Van Antwerp*, 56 id. 261; *Stuart v. Palmer*, 74 id. 183; 30 Am. Rep. 289.)

Notice, as we have seen, was given by publication, and that

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is sufficient if it conformed to the statute. The same question was before this court recently in reviewing proceedings similar to those now before us. We then held that the notice prescribed by the statutes now referred to gave sufficient opportunity and time to be heard. (*In re De Peyster*, 80 N. Y. 565.) But the appellant (the petitioner) insists that the notice referred to is not the notice required by statute. To us it seems otherwise. The Laws of 1841 (Chap. 171, § 1) provide for such a notice as was given, and whether the chairman of the board or the board itself is named can make no difference. In either case the objections, if any were made in answer to the notice, were for the board and not for the chairman alone to consider.

It follows that so much of the order of the Special and General Terms as disallows surveyors' fees should be reversed, the residue of the order affirmed, and the motion to vacate the assessment denied, without costs to either party in this court.

All concur, except TRACY, J., absent.

Ordered accordingly.

JAMES M. G. SMITH, as General Guardian, etc., Respondent,
v. JONATHAN C. ROBERTSON et al., Appellants.

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| 80 | 555 |
| 144 | 509 |

Where a testator, whose will authorized his executor to sell all his real and personal estate, and dispose of the proceeds, after the making thereof, had a child born, and thereafter died leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," *held*, that under the statute (2 R. S. 65, § 49), the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of sale, but that she could maintain ejectment to recover the same.

Where, however, it appeared that the real estate was at the time of the testator's death subject to a mortgage which the grantee paid, *held*, that

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the judgment should be without prejudice to his right to a lien for the amount so paid, or to be subrogated to the rights of the mortgagee.

(Argued June 15, 1882; decided October 10, 1882.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made February 15, 1881, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury, and granted a new trial. (Reported below, 24 Hun, 210.)

This action was brought to recover possession of two lots in the village of Middletown, Orange county, of which John J. Scott died seized.

In 1862 he made a will by which his executor was authorized to sell all his real and personal estate, and pay the proceeds to his widow. In April, 1864, he had a child born, a daughter in whose interest this action was brought. In May, 1864, the testator died. The daughter "was unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will." Defendants claimed the premises under a deed from the executor; they purchased subject to a mortgage which they subsequently paid.

William H. Stoddard for appellants. In order that plaintiff may sustain this action in ejectment a right of entry and possession must exist. (*Rowan v. Kelsey*, 18 Barb. 484; 2 R. S. 65, § 49.) The birth of plaintiff and death of the testator subsequent to the making of his will did not revoke the will. (1 Williams on Exrs. 95; 1 Jarman on Wills [1st Am. ed.], 106; 1 Kent's Comm. 52; *Bush v. Wilkins*, 4 Johns. Ch. 506; *Harris v. Van Denburgh*, 1 Denio, 27; *Shepherd v. Shepherd*, 5 T. R. 51; *White v. Bradford*, 4 M. & R. 10.) Section 49, 2 R. S. 65, does not revoke a will and was never intended for that purpose, but was for the purpose of providing for after-born children by fixing their portion of the estate, and directing that it should be recovered from the devisees and legatees out of the parts devised. (*Mitchell v. Blaine*, 5

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Paige, 588; *Thompson v. Carmichael*, 4 Sandf. Ch. 120; *Sanford v. Sanford*, 4 Hun, 175; Girard's Titles to Real Estate, 403; *Burlingham v. Belding*, 25 Wend. 463; *Cullen v. Taylor*, 42 Barb. 578.) The proceeds in this case being from realty, the mother is entitled to full dower interest and no more. (Girard's Titles, 574; *Davidson v. Freist*, 3 Sandf. Ch. 456; *Foreman v. March*, 1 Kern. 243.) If the will is not entirely revoked, the absolute direction and power to sell and convert into money the real estate of the testator given to the executor in said will operated as an equitable conversion of the estate into money, and the conversion takes place at the death of the testator. (*Horton v. McCoy*, 47 N. Y. 26; *Meaking v. Cromwell*, 1 Seld. 136; *White v. Howard*, 52 Barb. 286; *Bunce v. Vandegrieff*, 8 Paige, 37; *Stillwell Exr., etc., v. Nott*, 2 Sandf. Ch. 58; *Bogert v. Herbell*, 4 Hill, 492.) The subject of the devise would in this case be money and not lands, and the heir must be compelled to follow the proceeds and not the lands. (*Hatch v. Bassett*, 52 N. Y. 361; *Gorerly v. Campbell*, 6 Hun, 218.)

Charles H. Winfield for respondent. When John J. Scott died the statutes operated so as to vest the title of his real estate in his child, and at the moment of his demise she became seized absolutely of the property in question. (2 R. S. 65, § 49; 3 R. S. [6th ed.] 64; *Sanford v. Sanford*, 61 Barb. 293; *Mitchell v. Bain*, 5 Paige, 588; *Mason v. Jones*, 2 Barb. 229; *Rockwell v. Geery*, 4 Hun, 606; *Plummer v. Murray*, 51 Barb. 201; *Williams v. Freeman*, 83 N. Y. 561, 568.) The real estate of John J. Scott having vested absolutely in Carrie B. Scott, she alone could convey the title. (*Sigler v. Van Riper*, 10 Wend. 414; *Green v. Putnam*, 1 Barb. 500; *Wiles v. Peck*, 26 N. Y. 45; *Scott v. Howard*, 2 Barb. 321; *Ash v. Cook*, 3 Abb. 389; *Maloney v. Horan*, 36 How. 267.) The theory that John J. Scott left a will of personalty, and that his directions to his executor to convert all his property into money, made it a will of personalty under the doctrine of equitable conversion, is untenable, because the doctrine cannot

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be construed to annul the statute. (Story on Equity, §§ 792, 1212; *Matter of the Will of Fox*, 52 N. Y. 530; 63 Barb. 157, 159.) The fact that defendants paid off the mortgage of \$1,000 will not defeat the title in plaintiff's ward. That act will not bar ejectment. (*Lowell v. Parkhurst*, 4 Wend. 369; *Watson v. Cris*, 11 Johns. 437.) Plaintiff, as general guardian, being entitled as such to the possession of the ward's real estate, can maintain ejectment in his own name. (Tyler on Ejectment, 173, 174, 538; *Wade v. Cole*, Ld. Raym. 130; *Holmes v. Seely*, 17 Wend. 75; *Combs v. Jackson*, 2 id. 153; 2 Kent's Comm. 228.)

RAPALLO, J. We are of the opinion that on the death of John J. Scott, the testator, the real estate in controversy descended to his infant daughter, under the provision of 2 R. S. 65, § 49, in the same manner as it would have descended if the father had died intestate, and that the infant does not take under the will, or subject to any of its provisions.

The statute, instead of declaring the entire will revoked by the subsequent birth of issue for whom no provision is made, renders it inoperative as to that portion of the testator's estate which, if he had died intestate, would have descended, or been distributed to the after-born child. When, as in this case, there is no other heir, the whole of the real estate descends to the child, as it would have done had there been no will, subject only to the dower of the widow, and the power of sale contained in the will fails. The remedies given by the statute against devisees, to recover a portion of the property where only a portion descends to an after-born child, do not operate to subject the estate of such child to a power of sale contained in the will, or to confine his remedies to a pursuit of the proceeds of sale. He is entitled by the plain terms of the statute to recover the same portion of the *corpus* of the estate which he would have been entitled to had his father died intestate.

The order should be affirmed, and judgment absolute rendered against the defendants on their stipulation; but as it appears that, at the time of the death of the testator, the real

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estate was subject to a mortgage which the purchaser discharged, the judgment should be without prejudice to his rights to a lien for the amount paid to discharge the mortgage, or to be subrogated to the rights of the mortgagee.

All concur.

Order affirmed and judgment accordingly.

THE PROVIDENCE AND STONINGTON STEAMSHIP COMPANY, Appellant, v. THE PHOENIX INSURANCE COMPANY et al., Respondents.

Each of the defendants issued to plaintiff a policy of marine insurance insuring its steamship M. against "all perils of the sea and navigation usually taken by marine underwriters, loss by fire excepted." The policies were in various sums amounting in all to \$75,000, which for the purposes of the insurance was declared to be the value of the vessel. She went ashore in a violent storm, and as the efforts of the officers and crew were ineffectual to get her off, she was in danger of becoming a total wreck. Plaintiff thereupon, the insurers having consented that it should use every effort to save her, employed a wrecking company by whose aid she was set afloat and taken to New York, where she was repaired. The repairs, which amounted to \$46,000, were paid for by the insurers. Plaintiff paid the bill of the wrecking company and other expenses incurred in getting the vessel afloat, amounting to \$21,840. In an action to recover the amount so paid, *held*, that the necessary expenditures so incurred were covered by the policies equally with those incurred for repairs.

It seems that defendants would have been so liable had they not given their assent.

A general average was made in which the value of the steamer was stated at \$275,000. It was claimed by defendants that if liable at all, they were only liable for such proportion of the \$21,840 as the agreed value of the steamer, \$75,000, bears to its value stated as aforesaid for general average. *Held* untenable; that the value as agreed upon for the purposes of insurance was conclusive between the parties, and within the limit of the sum insured plaintiff was entitled to full indemnity for all losses occasioned by the perils insured against; that therefore the items in question could not be considered the subject of general average, but should be deemed to have been incurred for the benefit of the insurer only, and as the whole amount thereof, together with the expenses for

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repairs, was less than the sum insured, plaintiff was entitled to recover the whole.

P. & S. S. S. Co. v. P. I. Co. (22 Hun, 517), as to this last proposition, reversed.

(Argued June 16, 1882; decided October 10, 1882.)

THESE are cross appeals from a judgment, in favor of plaintiff, of the General Term of the Supreme Court, in the first judicial department, entered January 21, 1881, upon a case submitted under section 1279 of the Code of Civil Procedure. (Reported below, 22 Hun, 517.)

The material facts are stated in the opinion.

William M. Evarts for appellant. Each element of the cost of making the stranded vessel whole is as evident an element of the measure of direct damage by stranding by a peril of the sea, as any other. (2 Arn. Ins. 957 [marg.], and note; *Ins. Co. v. Fitzhugh*, 4 B. Monr. 160; *Giles v. Eagle Ins. Co.*, 21 Pick. 456; 2 Phil. Ins., chap. 16, §§ 1424–1433.) The cost of getting off the stranded ship, etc., enters necessarily into the right of the assured in computing for the purpose of a constructive total loss the cost of his repairs. (2 Arn. Ins. 1099–1101 [marg.]; 2 Phil. Ins., §§ 1535, 1551.) The assured may in all cases recover his direct loss without having or collecting any general average contribution, leaving it for his underwriters, after paying him, to pursue the other interests for their general average contributions. (*Maggrath v. Church*, 1 Caines, 196; *Griswold v. Un. Mut. Ins. Co.*, 3 Blatchf. 231.) The doctrine of general average, as a head of marine insurance law, does not rest upon and is not governed by any specific clauses or stipulations of the policy. (1 Arn. Ins. 34–5; 2 id. 851 [marg.]; Lowndes' Gen. Ave. 275; 2 Arnold, 876–887; 2 Phil., § 1269.) Irrespective of the stipulation in its actual form, and giving it no other effect than the mere statement of vessel value in a marine policy imports, the policy valuation must govern in a general average as well as a direct loss by peril of the sea. (*Griswold v. Union Ins. Co.*, 3 Blatchf. 231, 238, 240; *Forbes*

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v. *The Manuf. Ins. Co.*, 1 Gray, 371, 375; *Mut. Ins. Co. v. Cargo of Ship "George,"* Olcott's N. Y. Dist. Ct. Rep. 157; *Lewis v. Rucker*, 2 Burr. 1167; *Tunno v. Edwards*, 12 East, 488; *Goldsmid v. Gillies*, 4 Taunt. 803; *Forbes v. Aspinwall*, 13 East, 323; 2 Phillips on Ins., § 1203, pp. 17-18, 19; *Shaw v. Felton*, 2 East, 109; Stevens' Av., Part 2, Art. 1, p. 1; *Allen v. Sugrue*, 8 B. & C. 564; *Irving v. Manning*, 1 House of Lords Cas. 287; *Young v. Turning*, 2 M. & G. 601; Eng. L. R., 4 Com. Pl. Div. 371.) Under the "sue, labor and travail" clause, and the express sanction by the underwriters of the expenditure made by the plaintiff in getting the vessel off the rocks, the plaintiff is entitled to recover the expenditures thus made. (*Atchison v. Lohre*, Eng. L. R., 4 App. Cas. 755.)

William Allen Butler for respondents. The contract of insurance contained in the policies was to indemnify against the risk of such perils of the sea and navigation as are usually taken by marine underwriters, loss by fire excepted, and contained no provision binding the insured to bear any part of the expenses incurred in saving the subject of insurance during, or after, the peril insured against. (1 Arnould on Ins. Maclachlan, 1872, 232; 2 id. 725; Lowndes on Average [ed. 1873], 290; *Dixon v. Whitworth*, L. R., 4 Com. Pl. Div. 371; *Aitchison v. Lohre*, L. R., 4 App. Cas. 755, 764.) The insurance companies were in no event bound to contribute toward the salvage expenses beyond the proportion of their interest in the vessel as valued in the policies (\$75,000), to the value as stated in the general average adjustment (\$275,000). (Lowndes' Law of Average [3d ed.], 243; 2 Pars. on Ins. 348; 3 Kent's Comm. 274; *Hotchkiss v. Ins. Companies*, 1 Robt. 499; 2 Phillips on Ins., § 1412; *Potter v. Ocean Ins. Co.*, 3 Sumn. 37; *Clarke v. United F. & M. Ins. Co.*, 7 Mass. 364, 377; *Griswold v. Union Mut. Ins. Co.*, 3 Blatchf. 231, 232.)

DANFORTH, J. The several defendants insured the steamer Massachusetts "against all perils of the sea and navigation

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usually taken by marine underwriters (loss by fire excepted), in favor of the plaintiff in various sums, amounting to \$75,000, and this, for the purposes of the insurance, was declared to be the value of the vessel. During the life of the policies she went ashore in a violent storm, and the efforts of the officers and crew to get her off being unsuccessful, the vessel was in danger of becoming a total wreck. By the aid of a "wrecking company" she was set afloat and reached New York, where she was docked for repairs. They amounted to \$46,000, which was paid by the insurers, and thereafter the "wrecking company" rendered a bill for their services in saving the steamer, which was finally adjusted with the assent of the insurers at \$17,500, and paid by the assured. They paid other expenses incurred to the same end, to the amount of \$4,340, making the total expenditure for that purpose \$21,840.

Afterward, a statement of general average was made by certain persons, in which the value of the steamer was stated at \$275,000. The insurance companies deny any liability for any part of these expenses, upon the ground stated by their counsel, that "the payment of \$46,000 covered the entire damage caused by the perils insured against." But if otherwise, they claim that their liability should be limited to such proportion of \$21,840, as the agreed value of the steamer (\$75,000) bears to its value as stated for general average.

Upon this state of facts two questions were submitted to the General Term: *First*. Are the insurance companies, having paid \$46,000 to cover the cost of repairs to the steamer, bound to pay any thing more? *Second*. If they are liable, what amount are they bound to pay? The first question was answered in the affirmative; and in respect to the second, the court held that the case was one for contribution upon a general average, according to the respective interests of the insured and the insurers, and that the interest of the insurer was to be limited to the sum fixed in the policies, as the value of the steamer, and the interest of the insured, to the difference between that sum and its actual value, as fixed by the adjusters; so that the share of expenses to be charged to each should

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bear the same proportion to the value of his interest as the whole sum bears to the appraised value of the ship. Both parties appeal to this court — the insurers, because they are held bound to pay any part of the expenses; the assured, because they (the defendants) were not charged with the whole.

We concur in the conclusion reached by the learned General Term as to the first question. It would seem plain that the assured is entitled to be indemnified against all the damage done by the perils insured against, and, notwithstanding the argument in behalf of the defendants, we find it impossible, under this rule, to separate the necessary expenses incurred in removing the steamer from the place where she stranded to the dock where she could be repaired, from the expenses of the repairs there made. Each class of expense was equally necessary, and made so by the same peril. If it had been possible to repair the steamer in the place where the storm placed her, and it had been done, the damage would not have been made good, or the loss satisfied, so long as she was detained upon the rock; for she was placed there by the winds and waves, and thus the detention was from a peril of the sea, one usually taken by marine underwriters, and, therefore, by the very language of the policies before us, incurred by these defendants. Disbursements necessarily made in order to get a ship into the sea, and then to a place where she may be fitted to keep the sea, would seem to be within the agreement of the defendants as much as the expenses incurred for repairs. The loss incurred, and the loss insured against, included both items; without both, the vessel could not be rendered navigable or capable of being carried on for any voyage.

The owners of a vessel damaged by perils insured against are at liberty to estimate the expense of repairing it, in order to determine whether it should be treated as a total loss, or whether it could be repaired, and at a reasonable cost made serviceable for future navigation. It is, therefore, well settled that for this purpose the expense of releasing her from peril, as getting her afloat from the rock, or from submergence in the sea, preparatory to repairing, may be added to the ex-

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pense of the repairs. (*Sewall v. U. S. Ins. Co.*, 11 Pick. 90; Arnould on Insurance [Perk. ed. 1850], 1106.) This is the rule as between the assured and the underwriter, and I have found no case to the contrary.

It is clear, then, that to some extent, at least, the insurers were bound to contribute to those expenses. I do not consider it necessary to inquire whether the "sue and labor" clause now generally, if not universally, found in marine policies may be implied into the policies before us, for without that it is the privilege, if not the duty, of the insured to take every reasonable measure for the recovery and restoration of the damaged vessel. But in this case there was, as the Supreme Court held, an express assent by the insurers that the owner of the steamer should use every effort to save her.

In regard to the other question, we think the learned court below erred. By agreement of the parties, the steamer was, for the purposes of the insurance, valued at \$75,000, and as the expenses necessarily incurred in taking the vessel to the dock are not less the subject of indemnity than the expenses of repair, both should be allowed to the extent of the sum insured. Within this limit these expenses could not, as between the parties to the policies, be considered the subject of general average, but should be deemed to have been incurred for the benefit of the insurers only. Any other construction would impair the effect of the contract, and reduce the liability of the underwriters below the sum bargained for and for which they received a premium, and relieve them from the operation of the general rule under which the assured may recover from the underwriter, in respect of any expenditures which he has been obliged to incur in consequence of any of the perils insured against. (2 Arnould on Ins., 844, § 8; Marshall on Insurance, p. 474, B. 1, chap. 13, § 8; chap. 17, § 2, p. 595.)

As between these parties, no inquiry is pertinent as to the actual value of the steamer, for as to them it has been fixed by agreement, and for every purpose (fraud being out of the question) it must be taken as so fixed that the insured might be indemnified to that amount, for all losses occasioned "by

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perils of the sea and navigation." The value so fixed and inserted in the policy is said to be in the nature of liquidated damages. (3 Kent, 273.) It is, therefore, not open to inquiry or dispute after a loss occurs, but is conclusive between the parties in respect of all rights and obligations which arise upon the policy; and the learned commentator above cited disapproves the doctrine of certain cases which suggest a limitation to this rule, by applying it only to a total loss, saying, "the better opinion of the text-writers is, that in settling all losses, total or partial, the valuation of the property in the policy is to be considered as correct in the adjustment of the loss, and the true measure and basis of the valuation according to the contract of indemnity."

In *North of Eng. Ins. Assn. v. Armstrong* (L. R., 5 Q. B. 244), the court say, in such a case, "the parties are estopped, between one another, from disputing the value of the thing insured as stated in the policy," and so applied the doctrine that the insurance company, having paid £6,000 as upon a total loss, occasioned by another ship running down the ship insured, which was, in fact, worth £9,000, but valued in the policy at £6,000, was held entitled to the full sum recovered by its owners from the vessel which caused the injury. The owners claimed to participate upon the real valuation, but the court held against them.

Now the contention of the defendant here is that, as the real value of the steamer was \$275,000, the sum of \$200,000 represents the interest of the owners and should share the loss caused by the recovery of the ship. The answer to it is that given in the case cited. The insurers are estopped from saying there was any value in excess of the \$75,000 agreed upon, and to that extent they undertook to indemnify the owners. They now seek to divide the loss by presenting a different basis of value. If they succeed the assured will lose the indemnity for which they paid, and the consequences of a loss would be cast upon them. Such a result is required by no adjudged case, and would be against the principles both of law and equity. The sum now claimed for the expenses incurred is, we think, justly due the insured on account of damage

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caused by the perils insured against, and as it is within the limits of the sum named, should be paid by the insurers, according to the terms of the engagement entered into by them.

The defendants' appeal, therefore, fails, and the plaintiff's succeeds. The judgment should be so modified as to require each defendant to pay such proportion of \$21,840 as the sum insured by it bears to the total amount, \$75,000, and so modified, affirmed, with costs to the plaintiff.

All concur.

Judgment accordingly.

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DE WITT C. WEEKS et al., Appellants, v. WILLIAM MCCARTY
LITTLE, Individually and as Executor, etc., Respondent.

Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work contracted for could not be completed until other work to be done by the owner was finished, *held*, that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged him from liability for the liquidated damages; and this although some work not affected by the delay of the owner was not completed within the time; that as the damages were payable upon a failure of entire completion, which was rendered impossible by the owner's act, a recovery could not be had for a failure which she made inevitable.

Weeks v. Little (15 J. & S. 1), reversed in part.

(Argued June 19, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 6, 1880, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 15 J. & S. 1.)

This action was brought to recover a balance alleged to be due under a contract between the plaintiffs and Augusta McC. Little, defendant's testator, for the performance by the former of certain work in the construction of a building in the city of New York.

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By the contract the work was to be completed September 1, 1877, and it was stipulated that for each and every day after that time that the work contracted for remained unfinished plaintiffs would pay \$20, which was stated to be liquidated damages. The work was not completed December 24, 1877. Defendant set up as a counter-claim and claimed the damages as stipulated. The referee allowed the damages from and after October 1, 1877.

The material facts appear in the opinion.

Robert W. De Forest for appellants. Where, after the making of a building contract, additions to the original specifications are made at the request of the owner, increasing the labor and requiring additional time, the time limited for the completion of the work will be deemed to have been extended by mutual agreement of the parties, if an extension is necessary for the protection of the contractor. (*Smith v. Gugerty*, 4 Barb. 614; *Stewart v. Keteltas*, 36 N. Y. 388; *Allamon v. Mayor, etc., of Albany*, 43 Barb. 33; *Green v. Haines*, 1 Hilt. 254; *Foley v. Gough*, 4 E. D. Smith, 724; *Van Buskirk v. Stow*, 42 Barb. 9; *Gallagher v. Nichols*, 60 N. Y. 438; *Farnham v. Ross*, 2 Hall, 167; *Doyle v. Halpine*, 1 J. & S. 352.) Little having prevented the completion of the building by failing to complete those parts of the work undertaken by himself, cannot claim liquidated damages. (*Stewart v. Keteltas*, 36 N. Y. 388.) He is estopped by his acts from claiming damages. (*Hechman v. Pinkney*, 81 N. Y. 214; *Smith v. Gugerty*, 4 Barb. 614; *Stewart v. Keteltas*, 36 N. Y. 388; *Doyle v. Halpine*, 23 Sup. Ct. 352.)

Charles A. Jackson for respondent. Whether or not there has been a waiver or rescission, is a question of fact. (Code of Procedure, § 1337; *Collender v. Philan*, 79 N. Y. 369-70.) The modification of the original contract embodied in the agreement of April 24, 1877, came within the proviso of the clause in the original contract providing that no alterations or additions shall in any way affect or make void the contract.

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(*Legge v. Harlock*, 12 Q. B. 1013; *Lauer v. Brown*, 30 Barb. 420.) Where there is an express agreement the law will not imply one. (*Cutler v. Powell*, 6 T. R. 320; *Jennings v. Camp*, 13 Johns. 96; *Ladue v. Seymour*, 24 Wend. 63; *Galvin v. Prentice*, 45 N. Y. 165.) An agreement under seal cannot be waived or rescinded by a parol agreement, unless such agreement is executed and founded on a valid consideration. (*Suydam v. Jones*, 10 Wend. 180; *Delacini v. Bulkley*, 13 id. 71; *Allen v. Jaquish*, 21 id. 628; *Eddy v. Graves*, 23 id. 82; *Gardner v. Clark*, 21 N. Y. 404-5; *Ripley v. Etna Ins. Co.*, 30 id. 164; *Dodge v. Crandall*, id. 306-307.) The fact that defendant was doing work upon the building after October 1, 1877, is unimportant. (*Macintosh v. Midland R. R.*, 14 M. & W. 548.) Presence at the building and urging on the work cannot possibly be construed as working an estoppel. (*Pike v. Butler*, 4 N. Y. 363; *Reed v. Bd. of Education*, 4 Abb. Ct. App. 24; *Roberts v. Opdyke*, 40 N. Y. 266.) A party may waive his right to throw up a contract for breach of condition without waiving his right to recover damages for the imperfect performance of the contract. (*Esmond v. Benschoten*, 12 Barb. 366; *Sinclair v. Talmadge*, 35 id. 606-7; *Jewell v. Schnepfel*, 4 Cow. 64; *Murphy v. Buckman*, 66 N. Y. 297; *Taylor v. Mayor*, 83 id. 625.)

FINCH, J. We do not think it necessary to discuss and determine the effect upon the claim for liquidated damages of the delay produced by the modification of the original plan which added new walls and two additional stories. Assuming for present purposes, what we do not decide, that the time of performance was extended only to October 1, and that such extension was intended and understood to cover the changes of plan and increased amount of work, and assuming also that the original contract, with its damages for delay, applied to and controlled the modified and increased work, we are yet of opinion that the plaintiffs' non-performance was occasioned and excused by the act of the defendant, and the counter claim was, therefore, improperly allowed.

Opinion of the Court, per FINCH, J.

The rule is well settled that where the work to be performed by the builder cannot be performed until the other work provided to be done by the owner or his employes is finished, the failure by the latter to complete their work in season to enable the builder to end his within the time limited by the contract is a sufficient excuse for his delay beyond the agreed period of completion. (*Stewart v. Keteltas*, 36 N. Y. 388.) In the case at bar the referee has found and certifies as facts, that the defendant agreed to furnish and complete certain parts of the building to be erected; that among these was all the marble work, including the mantels and treads of stairs, the elevator and kitchen lift, the steam-heating apparatus which was not determined upon until the brown coat of mortar was already on, and the ranges; that the steam-heating work was not completed till after November, and the marble work, elevator and lifts were not done until December 24; that "the plaintiffs could not complete many parts of their contract work until after these parts of the building were furnished by defendant and put in place, and were delayed and prevented from completing said parts of their contract work by reason of defendant's failure to furnish them;" and that plaintiffs did not complete some part of their work which was not dependent upon the defendant's action until December 24. Irrespective of the last fact found, the case is brought fully within the rule above stated. The finding is definite and clear that complete performance within the contract time was rendered impossible by the act of the defendant, and the very just result follows that the defendant cannot recover damages for a delay which she herself occasioned. The referee found as a conclusion of law the exact contrary, for, upon request, he refused to find "that the failure of defendant to furnish those parts of the work undertaken by her upon the completion of which the completion of plaintiffs' work depended affords a legal excuse for non-performance of plaintiffs' work before December 24." Upon what ground this refusal rested we do not know. The opinion of the referee and of the General Term are silent on the subject. The learned counsel for the respondent in the brief furnished on the argument seems

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to touch it very lightly and guardedly. He says that the fact of work being done after October 1 by the defendant is "unimportant." That is true, but it becomes very important when supplemented by the further fact that this very work thus continuing rendered impossible plaintiffs' performance within the contract time. The learned counsel adds that "plaintiffs were not prevented from finishing by reason of the defendant." The referee finds that they were. It is true he also finds that some work was delayed which was not affected by the delay of the defendant. We do not see how that fact alters the just result. To effect that would require us to assume what is not proved, and we cannot know, that there would have been delay in the independent work if the dependent work had not been hindered. The contractor could gain nothing by haste and pressure in one direction so long as entire completion was delayed by his employers. We cannot divide and apportion the fault. It is enough that damages were payable upon a failure of entire completion, and that was rendered impossible by the defendant's act, and her executor cannot recover for a failure which she made inevitable. But for that we cannot say that there would have been any delay beyond the contract time.

The judgment should be reversed so far as it allows defendant's counter-claim for liquidated damages and interest, and a new trial is granted as to such counter-claim, costs to abide the event.

All concur.

Judgment accordingly.

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| 180 | 287 |

FREDERIC WRIGHT et al., Respondents, v. STEPHEN CABOT et al., Appellants.

The rule that a third person may deal with an agent as principal, who holds himself out as such, concealing his agency, and not disclosing its origin, and that the real principal cannot so assert his rights as to cut off equities which have grown up between such third person and the agent, has

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no application when the former knew, or had sufficient information to fairly create an inference of the existence of the agency, and to put him upon inquiry, although the name of the principal was not disclosed.

Where, therefore, plaintiffs consigned certain merchandise to the firm of E. & C. S. for sale, which firm employed defendants as brokers to, and they did, make the sale, with knowledge that E. & C. S. were not the sole owners of the goods, or under circumstances sufficient to put them upon inquiry, *held*, that an application of a portion of the proceeds of the sale in payment of a prior indebtedness of E. & C. S. to them, was unauthorized, and that plaintiffs were entitled to recover the same.

Soon after the proceeds of sale came into defendants' hands, an attachment was served upon them, issued in an action brought by other creditors of E. & C. S. against them. No portion of the proceeds was taken under the attachment. But, after defendants had been fully notified of plaintiffs' claim, they were examined in supplementary proceedings, after judgment in said action, and testified that they owed E. & C. S. the balance of the proceeds of such sale, concealing the claim and ownership of plaintiffs. An order was made that they pay over such balance to the sheriff, which they did. *Held*, that such payment was no defense, as defendants had it in their power, by stating the facts, to prevent the making of the order, and it was their duty so to have done; having omitted this duty without reason or excuse, their payment was, in effect, voluntary.

One of plaintiffs and one of the firm of E. & C. S. were asked as witnesses and were allowed to answer, under objections and exceptions, what plaintiffs' business relations with that firm were. The answers were to the effect that the goods were shipped to said firm, to be sold for account of plaintiffs. *Held*, that even if any one of the inquiries was too broad in its terms, as the answers were confined to the precise issues, there was no error.

On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception. *Held* no error; that while defendants were entitled to the whole of the letters, their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed.

Where there has been an opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the return, no objections because of such imperfect execution will be heard on the trial.

(Argued June 19, 1882; decided October 10, 1882.)

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APPEAL from judgment of the General Term of the Superior Court of the city of New York, in favor of plaintiffs, entered upon an order made March 10, 1881, which overruled defendants' exceptions and directed judgment on a verdict directed by the court. (Reported below, 15 J. & S. 229.)

This action was brought to recover the proceeds of the sale of a quantity of "Esparto grass" belonging to plaintiffs, who were doing business at Liverpool, England, which was consigned by them to the firm of E. & C. Stokes at Philadelphia, for sale on their account. That firm employed defendants, who were brokers doing business in New York, to make a sale; this they did and received the proceeds.

The further material facts are stated in the opinion.

F. R. Coudert for appellants. Plaintiffs are estopped because they allowed the Stokes to seem to be entitled to the proceeds, and thereby induced defendants to look to the proceeds in their hands for payment of the balance due from the Stokes and to refrain from taking other steps to protect themselves. (*Voorhis v. Olmstead*, 66 N. Y. 117; *Read v. Jaudon*, 35 How. Pr. 303; Story on Agency, §§ 386, 390, 420; *Mitchell v. Bristol*, 10 Wend. 495; *Tainter v. Prendergast*, 3 Hill, 72; Biglow on Estoppel, 468; *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325, 329.) Defendants were bound to give the certificate to the sheriff. (Code of Civil Procedure, § 650.) All they were bound to do was to notify their principals, the Stokes, at once. (*Bilven v. H. R. R. R. Co.*, 36 N. Y. 403, 407; *Holmes v. Remsen*, 4 Johns. Ch. 460; *S. C.*, 20 Johns. 229; *Donovan v. Hunt*, 7 Abb. Pr. 29; *Cook v. Holt*, 48 N. Y. 275; *Gibson v. Haggerty*, 37 id. 555; *U. S. Trust Co. v. Wiley*, 41 Barb. 479.) The court erred in admitting testimony as to the business relations between the plaintiffs and E. & C. Stokes, under the defendants' objection to its relevancy. (1 Greenleaf on Evidence, § 52; *Townsend Manuf. Co. v. Foster*, 51 Barb. 346, 352; 41 N. Y. 620; *Clark v. Vorce*, 19 Wend. 232; *Underhill v. N. Y. & H. R. R. Co.*, 21 Barb. 489; *Worrall v. Parmelee*, 1 N. Y. 519; *Wilson v. Wilson*, 4

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Keyes, 413; *Baird v. Gillett*, 47 N. Y. 186, 187; *Anderson v. R. W. & O. R. R. Co.*, 54 id. 334; *Havermeyer v. Havermeyer*, 11 J. & S. 506.) The extracts from letters, annexed to the deposition of the plaintiff Wright, were incompetent, and were improperly admitted under that objection. (*Walbridge v. Kilpatrick*, 9 Hun, 135; *Sizer v. Burt*, 4 Denio, 426; *Dennis v. Barber*, 6 S. & R. 620, 625; *Taylor v. Reggs*, 1 Peters, 591; 1 Greenleaf on Evidence, § 82; Cowen & Hill's note; 1 Phillips on Evidence, 602.)

Geo. H. Fletcher for respondents. If the commission had not been properly executed, it was the defendants' duty to have it corrected before going to trial. A motion for return and execution was the proper and necessary method of raising the point. (2 Wait's Pr. 704; *Zellweger v. Caffè*, 5 Duer, 87, 100; *Sheldon v. Wood*, 2 Bosw. 267; affirmed, 24 N. Y. 607; *Bk. of Penn. v. Union Bk. of N. Y.*, 11 id. 205; *Burrill v. Watertown Bk. & Loan Co.*, 51 Barb. 106.) Under the Factors' Act defendants could get no relief, for their charges against Stokes were all antecedent debts, not incurred on the faith or credit of these goods or moneys of plaintiffs, then in their hands. (4 Edmonds' Stat., chap. 179, p. 461, §§ 3, 4.) Whenever any third person claims an interest in property sought to be summarily transferred in supplementary proceedings, no order for the delivery can be made therein. (*Rodman v. Henry*, 17 N. Y. 482; *Sherwood v. R. R. Co.*, 12 How. 136; *Grassmuck v. Richards*, 2 Abb. N. C. 359; *Manice v. Smith*, 5 N. Y. Weekly Dig. 255; *Edmondson v. McLoud*, 16 N. Y. 544; *Corning v. Tooker*, 5 How. 19.) Although a person having possession of property about the time of a levy be ignorant of an assignment, if, prior to any payment by him to the sheriff, he has notice of the assignment, attachment proceedings are no defense to him in an action brought by the assignee against him. (*Greentree v. Rosenstock*, 61 N. Y. 593; *Gibson v. Haggerty*, 37 id. 557, 560; *Lenear v. Woods*, 7 N. Y. Weekly Dig. 341.) The agency of the Messrs. Stokes was revoked by their bankruptcy. (Story on Agency, § 486; 2 Kent's Comm. [4th

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ed.], § 41, p. 645; Story on Bailments, 211; *Audenried v. Betteley*, 8 Allen, 202; *Hudson v. Granger*, 5 B. & Ad. 27, 31, 32.) Their principals and sub-agents, the defendants, were placed merely in the same attitude as if their authority had been revoked by death. (*Audenried v. Betteley*, 8 Allen, 302; *Jackson Ins. Co. v. Partee, Admr., etc.*, 9 Heisk. [Tenn.] 296; *Lehigh Coal Co. v. Mohr*, 83 Penn. St. 228.)

FINCH, J. The evidence renders it entirely certain that the Esparto grass sold by the defendants, and for the proceeds of which they are sued, was the sole property of the plaintiffs, consigned by them to E. & C. Stokes as agents for its sale, who were bound to remit to their principals the whole proceeds, after deducting commissions and expenses. The defendants, therefore, have applied the property of plaintiffs to pay the debts of E. & C. Stokes, and are here to defend that application. They invoke for that purpose the general rule that third persons may deal with one as principal who holds himself out as such, concealing his agency and not disclosing its origin; and that the real principal cannot so assert his rights as to cut off the equities which have grown up between such agent and third persons. (Wharton on Agency, § 465; Story on Agency, § 390.) This rule has its source and its justification in the broader doctrine that where one of two innocent parties must suffer, he shall bear the loss whose act made its occurrence possible. But neither the rule nor its reason can apply where the third person knows or has sufficient information to fairly infer the existence of an actual agency, although the name of the principal be not disclosed. (*Hogan v. Shorb*, 24 Wend. 462; *Maanss v. Henderson*, 1 East, 335; *Bliss v. Bliss*, 7 Bosw. 345.) And the same result follows where, without actual knowledge of the agency, the circumstances are such as fairly to put the third person on inquiry. (*Baring v. Corrie*, 2 Barn. & Ald. 137.) Most of the cases referred to were those in which the third person was a purchaser, and distinctions are drawn, not necessary to be here considered, between cases in which the supposed principal was a factor, having possession of the goods,

and those in which he was a mere broker, negotiating without such possession. Omitting any notice of these, and of other distinctions, it is sufficient, for the purposes of the present inquiry, to say that no form of the rule invoked by the defendants can justify their defense, if it is apparent that they knew or had good reason to know that E. & C. Stokes were not in fact the principals, or the sole owners of the property sold. We are thus brought to consider the facts proved on the trial.

It was in August, 1877, that Stokes first spoke to the defendants about the shipment of goods which afterward occurred. The defendants were then engaged to sell the property as brokers, but nothing was said indicating its ownership. On the 8th of the same month, Stokes wrote the defendants announcing that a sample shipment had been ordered, and adding, "we have first-class correspondents who work with us on joint account." Again they wrote on the 5th of September speaking of advices from "our friends abroad," and adding, "they request us to introduce it in as quiet a manner as possible." On the 13th of October, Stokes wrote as to an advertisement of the grass and said, "we propose to send a copy to our correspondents in Europe, and consult them about putting an annual advertisement in." On the 21st of January, the defendants sold the goods, and eight or ten days later collected the price. On the 5th of February, Stokes again wrote to the defendants, complaining of their neglect to account, and saying "the goods were not ours, being on consignment, and we have so informed you frequently." No reply of the defendants, denying this statement, nor any contradiction of it on the witness stand was given. We must take it, therefore, as true. After all this information, and on the 11th of February, the defendants render an account in which they apply \$550 upon an old debt due them from E. & C. Stokes, contracted we know not when, but under an agreement made nearly six years before, and charging expenses and commissions, acknowledge a balance of a little over \$600. This sum they call in their answer the "net proceeds" of the sale. They plead no offset or counter-claim against E. & C. Stokes, nor any payment by a credit given,

but say only that such balance was the "net proceeds." On this state of facts we think no defense was established as to the \$550 withheld. The defendants knew or had good reason to know that E. & C. Stokes were not the sole owners of the goods, that others were interested, and even that the foreign correspondents were the probable owners and E. & C. Stokes merely consignees and agents. Beyond any doubt the facts and circumstances were strong enough to put the defendants on inquiry, and deprive them of any equity founded on a belief that E. & C. Stokes were the real and the sole principals with whom they were dealing. They must stand in a different attitude before they can use plaintiffs' property to pay Stokes' debt to them.

As to the balance, admitted by the defendants to have been in their hands, the defense relied on is that it was taken from them by compulsory process of law. The firm of Ralli Bros., who were creditors of E. and C. Stokes, sued out an attachment against them which was served on the defendants very soon after the proceeds of sales came to their hands. Those proceeds were never taken under the attachment. In April, 1878, the defendants were notified by an agent of the plaintiffs of the claim of the latter to the goods consigned to Stokes. At some time in the summer of the same year, the agent exhibited his power of attorney and claimed the property as belonging to the plaintiffs. And yet, in August of that year, the defendants examined in supplementary proceedings after judgment, obtained by Ralli Bros., testified that they owed E. & C. Stokes the balance in question, concealed the claim of ownership of plaintiffs, in that way suffered an order to be made that they pay it over to the sheriff, and thereupon paid it accordingly. The defendants had it in their power, by stating the facts of the case, to prevent the order from being made. (*Rodman v. Henry*, 17 N. Y. 482; *Edmonston v. McLoud*, 16 id. 544; *Locke v. Mabbett*, 2 Keyes, 457; *Teller v. Randall*, 26 How. Pr. 155.) It was their duty to have done so, and omitting it, without reason or excuse, their after payment to the sheriff was, in effect, voluntary and not compulsory.

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Such payment was no defense. (*Greentree v. Rosenstock*, 61 N. Y. 593.) As in that case, so in this, the defendants took it upon themselves to decide who was really entitled to the money, and must bear the consequences of their mistake.

Two exceptions to the admission of evidence remain to be considered.

One of the plaintiffs, examined on commission, was asked what their business relations with E. & C. Stokes were, and Stokes was asked under what arrangement he received the goods. Both questions were objected to as irrelevant. The answers showed that the goods were shipped to the firm of E. & C. Stokes, to be sold for account of plaintiffs. The evidence was, therefore, relevant. It was proper and necessary to establish the exact relation of each of the parties to the goods in controversy. If one of the inquiries was somewhat broad in its terms the answer was confined to the precise issues involved.

In the cross-examination of one of the plaintiffs whose evidence was taken on commission, he was requested by the defendants to annex copies of any correspondence with E. & C. Stokes. The witness annexed extracts from the letters and not the whole of the same. On the trial the plaintiffs read these extracts under an objection and exception. Undoubtedly the defendants were entitled to have had the whole of the letters and not extracts, but if they so desired, their remedy was by motion in advance of the trial to have the error in the execution of the commission corrected, either by annexing the full letters, or striking out the extracts, or suppressing the deposition. Not having taken that remedy they must be held to have assented to the mode in which the commission was executed. (*Com. Bank of Penn. v. Union Bk.*, 11 N. Y. 205; *Sturm v. Atlantic Mut. Ins. Co.*, 63 id. 87; *Zellweger v. Caffé*, 5 Duer, 100; *Union Bank of Sandusky v. Torrey*, 2 Abb. Pr. Cas. 269; *Sheldon v. Wood*, 2 Bosw. 267.)

In the case last cited the Superior Court, in which the present action was tried, established the rule, formally, that where opportunity had existed to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the

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return, no objections to the deposition would be heard on the trial, save those addressed to the competency of the witness, or the admissibility of evidence. The rule is reasonable and just. Here, the defect was in the execution of the commission. Letters were asked to be annexed, and the commissioner annexed extracts, instead of requiring complete copies. They could have been obtained before the trial. On a motion, the commission could have been sent back for that purpose. Such motion not having been made, the plaintiffs had a right to assume that the cross-examiner was contented with what he had obtained. And, besides, it is difficult to see how the admission of the extracts worked any possible harm. They proved nothing except what had already been proved and was nowhere contradicted, that the plaintiffs were the sole owners of the goods.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THE TOWN OF LYONS, Appellant, v. DWIGHT S. CHAMBERLAIN, Respondent.

Proceedings taken to bond the plaintiff in aid of a railroad resulted in a decision that bonds of the town should be issued to an amount specified, and commissioners on behalf of the town were appointed to subscribe for the stock and to issue the bonds. Said commissioners, the railroad corporation and one P. entered into an agreement, by the terms of which the former were to issue the bonds and place them in the hands of P., as trustee, to be exchanged for an equal amount of stock as the work of construction progressed. This action was brought against the parties to that agreement, to have said proceedings declared null and void, to enjoin the negotiation or disposition of the bonds and to require their cancellation. The referee found the bonded proceedings to be void for want of jurisdiction, but that P. had sold a portion of the bonds. Defendants were required to account for the proceeds, they to be allowed for all sums paid out of the same in good faith in constructing the road or for any legal purpose mentioned in the agreement. An accounting was had under these findings, and a judgment was rendered against P. for the balance of the proceeds in his hands. Plaintiff objected to

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the allowance for moneys expended. *Held* untenable; that to entitle it to recover any of the proceeds of the bonds plaintiff must recognize the validity of the bonds, as, if it claimed them invalid, none of the proceeds thereof belonged to it and it could only recover upon the theory that the bonds had been made and negotiated wrongfully and without authority, and had gone into the hands of *bona fide* holders, who could enforce the same; that, therefore, as plaintiff was in court claiming the proceeds of the bonds it could take no benefit from the finding as to their invalidity, and P., as trustee, was entitled to credit for all sums paid out by him within the scope of his duty and authority. Also *held* that P. was properly allowed his commissions.

The agreement, as made, limited the application of the bonds or their proceeds to the construction of the road in the county of W.; subsequently the commissioners gave to P. a written authority to pay out the bonds for the construction of the road in an adjoining county. *Held*, that P. was entitled to be allowed for payments so made.

It seems that had the action been maintained upon the finding as to the invalidity of the bonds, no injury was sustained, and no recovery could have been had beyond the costs and expenses incurred by the town in defending itself against an attempted enforcement of the bonds, as, if the proceedings were without jurisdiction and the bonds issued absolutely without authority, not by the town but by strangers falsely simulating authority, plaintiff was not estopped by the recitals in the bonds, and they could not be enforced against it, even under the decisions of the U. S. courts, by a *bona fide* holder.

Lyons v. Munson (99 U. S. 684), distinguished.

(Argued January 20, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made the second Tuesday of June, 1881, which modified a judgment entered upon a decision of the Special Term, and affirmed such parts of the interlocutory judgment herein as were appealed from. (Reported below, 25 Hun, 49.)

This action was brought to have it adjudged that certain proceedings to bond the plaintiff in aid of defendant, the Sodus Bay and Corning Railroad Company, were void and the bonds issued under it invalid, to restrain the negotiation or disposition of said bonds, and for judgment that the same be delivered up to be canceled.

These bonds purport to have been issued by virtue of an order made by the county judge of Wayne county in proceed-

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ings under the Railroad Act. (Chap. 907, Laws of 1869.) The defendants Cole, Perrine and Chamberlin were appointed commissioners by such order; they issued the bonds which were delivered to the defendant Parshall, on the 17th day of May, 1872, in pursuance of an agreement of that date, made between such commissioners, the railroad company, and said Parshall. By that agreement they were to be held by Parshall *in trust* — that they, or the proceeds thereof, “shall be first used to buy the right of way and the necessary grounds for the use of the road through the county of Wayne, for preparing or grading the road-bed and preparing the same for the ties, including masonry and bridging, and in purchasing and laying down the ties ready for the iron through the county of Wayne.” Parshall was to pay over to the railroad company the bonds, or their proceeds, as fast as the work progressed. By a subsequent instrument made by said commissioners on the 20th of February, 1873, it was noted that it was for the interest of the plaintiff that such railroad be constructed from its intersection with the Lake Ontario Shore railroad to near Geneva, Ontario county, and Parshall was authorized to use the proceeds of said bonds between these points. By the report of the referee it was adjudged that the bonding proceedings were invalid, for want of jurisdiction; that one hundred and nine of the bonds which were in the hands of Parshall should be surrendered up and be canceled, and that the defendants should account for the proceeds of forty-one bonds which had been sold, and for the proceeds of any coupons from the one hundred and nine bonds which had been sold. The eighth paragraph of the report of the referee is as follows: “8th. That the defendants account to the plaintiff for the remaining forty-one bonds of said town, and for any of the coupons or proceeds thereof, or of any of the coupons of the said one hundred and nine bonds sold by them or either of them; the said defendants to be allowed for all of the same and the proceeds thereof which they have in good faith laid out and expended in building and equipping said road through the county of Wayne, and for any legal purpose mentioned in

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the agreements between the defendant Parshall and the said commissioners in evidence before me, for which purpose a further reference should be ordered." It was also found that said defendants had acted in good faith in all their dealings with the bonds and the avails thereof. Upon this report an interlocutory judgment was entered, the eighth paragraph of which is substantially in the language of the report, and it was referred back to the same referee to take and state the defendant's account. In accordance with the provisions of such interlocutory judgment, an accounting was had, and upon the coming in of the report judgment was rendered against Parshall for the balance found to be in his hands. Further facts appear in the opinion.

Chas. H. Roys for appellant. The whole proceeding and undertaking before the county judge to bond the plaintiff was void, and an absolute nullity. (*Horton v. Town of Thompson*, 71 N. Y. 513; *Cagwin v. Town of Hancock*, 84 id. 532; *People v. Spencer*, 55 id. 135; *People v. Hughett*, 5 Lans. 89; *People v. Smith*, 45 N. Y. 772; *People v. Adirondack Co.*, 57 Barb. 656; *Fort Edward, etc., Plankroad Co. v. Payne*, 15 N. Y. 583; *B. & O. Turnpike Co. v. North*, 1 Hill, 58; *Troy, etc., R. R. Co. v. Tibbetts*, 18 Barb. 297; *People v. Batcheller*, 53 N. Y. 128; *Weismar v. Village of Douglas*, 64 id. 91; *People v. Hurlburt*, 46 id. 110; *Angel v. Town of Hume*, 17 Hun, 374; *Wilson v. Town of Caneadea*, 22 id. 217.) All courts condemn such proceedings when they involve the taxing power. (*Loan Association v. Topeka*, 20 Wall. 655; *Allen v. Inhab. of Joy*, 60 Me. 124; *Lowell v. City of Boston*, 111 Mass. 454; *Commercial Bk. v. Iola*, 2 Dill. 358; *Bissell v. Kankakee*, 64 Ill. 249; *Curtis v. Whipple*, 24 Wis. 350; *McGuire v. Smock*, 42 Ind. 1; *Howard v. First Independent Church, etc.*, 18 Md. 451; *Ex parte Selma, etc., R. R. Co.*, 46 Ala. 230; *Garrigues v. Commrs.*, 39 Ind. 66; *Suprs. of Fulton Co. v. Mississippi, etc., R. R. Co.*, 21 Ill. 338.) A town has no general authority to issue bonds, but only such special authority as is conferred by some statute, and can only

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bond in the way pointed out by the statute. (*Cagwin v. Town of Hancock*, 84 N. Y. 532; *Sturin v. Town of Genoa*, 23 id. 439; *Gould v. Town of Sterling*, id. 456.) Assuming that all the proceedings down to and including the appointment of commissioners were regular and valid, then the agreements are invalid from want of authority to make them. (Laws of 1870, chap. 507; *Jackson Co. v. Bush*, 77 Ill. 59; *Falconer v. B. & J. R. Co.*, 69 N. Y. 491; *People v. Van Valkenburg*, 63 Barb. 107; *Town of Wayne v. Sherwood*, 14 Hun, 423.) The fact that defendant Parshall acted in "good faith," and upon the belief that the two agreements were valid did not render the town liable for his expenditures as treasurer of the railroad company to the extent of the "allowances." (*Town of East Oakland v. Skinner*, 4 Otto, 94; *Henry v. Root*, 33 N. Y. 237; *Town of Springport v. Teutonia Svgs. Bk.*, 84 id. 403.) Parshall could not by a sale of the bonds acquire a different or better title to their proceeds. (*Comstock v. Hier*, 73 N. Y. 275; *Gilmour v. Thompson*, 49 How. 198; *Haynes v. Rudd*, 17 Hun, 477.) The order of the Special Term vacating the judgment, because the clerk computed and added interest from the date of the report of the referee on the sum awarded to the entry of judgment was erroneous. (Code, § 1235; Laws of 1869, chap. 807; *Hun v. Norton*, Hopk. Ch. 392.) Interest should have been computed from the date of the report. (*Jacot v. Emmot*, 11 Paige, 142.)

William F. Cogswell for respondent. The agreements entered into between the commissioners, the railroad and Parshall are void. (Laws of 1870, chap. 507; Laws of 1871, chap. 925, § 5.)

EARL, J. It is strenuously contended on the part of the plaintiff that the defendants are entitled to no credit whatever on account of the moneys received by Parshall from the bonds of the town and paid out by him on account of the railroad company, and whether or not this contention is well founded is the most important question in this case.

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There are only two theories upon which Parshall could be made absolutely liable for all the bonds negotiated or transferred by him. *First.* That he wrongfully, in bad faith, negotiated the bonds which had been made without authority and thus placed them in the hands of *bona fide* holders with the intention of making the town liable thereon, and thus making it liable and in that way causing it damage. An action to enforce such a liability would be one for a pure wrong to recover damages caused thereby.

This action was not commenced or tried upon this theory, and there is a finding that Parshall "in all his dealings with the plaintiff, and in his use of the bonds and coupons acted in good faith," and this finding cannot be said to be absolutely unauthorized by the evidence. The liability of Parshall cannot, therefore, be based upon this theory, which involves bad faith and an intentional wrong.

Second. The other theory is that the bonds were issued without any authority of the town, and that Parshall had no authority to act as agent of the town or receive or pay out the proceeds of the bonds on its account. To sustain this theory it was incumbent upon the town to assert and maintain that the proceeds of the bonds belonged to it. How did the proceeds of the bonds come to belong to it? If it repudiates the whole transaction in making and issuing the bonds, then the proceeds of the bonds did not belong to it, and the liability of Parshall could only be based upon the first theory. It can only claim the proceeds of the bonds by recognizing their validity, and thus ratifying the agencies through which they were made, negotiated and the proceeds obtained. It cannot repudiate the bonds and claim the proceeds of them. It matters not that it is forced by the decisions of the Federal courts to pay them. It could pay under compulsion and yet repudiate the bonds, and all the agencies through which they were issued, and then sue for the damages it suffered upon the theory first mentioned. But an action to recover money received for the bonds proceeds necessarily upon the assumption of the validity of the bonds.

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It matters not that the court has found that all the proceedings to bond the town were absolutely null and void. The plaintiff has no benefit from this finding, so long as it is in court claiming the proceeds of the bonds, and thus attempting to maintain this action upon the second theory above mentioned.

We must, therefore, assume that the town commissioners were properly appointed, that they were authorized to employ Parshall as agent, that the agreements they made with him were valid, and hence the main contention upon the argument before us must fail.

It is further claimed that certain errors were committed by the court below upon the accounting, and that Parshall was allowed certain credits to which he was not legally entitled.

We have carefully examined the accounts, and so far as we can perceive, the accounting as finally confirmed was conducted upon proper principles, and no error was committed to the prejudice of the plaintiff.

The judgment should be affirmed.

FINCH, J. The plaintiff must rely upon one of two theories, either of which necessarily excludes the other: The case has been decided upon the ground that Parshall, relatively to the town of Lyons, stood in the position of its trustee, charged with the performance of certain duties, and that the trust having been ended by the insolvency of the railroad company, and its failure to fulfill the conditions which gave it a right to the unexpended bonds, the trustee was bound to account as such, and in the process, was entitled to credit for all sums lawfully paid out by him within the scope of his duty and authority. But the plaintiff comes to us on this appeal with an entirely different theory, the aim of which is to deprive Parshall of any credit whatever, while compelling him to account for the whole of the bonds sold. This result is claimed to follow from the adjudication already made in the action, that the bonds were wholly void for want of jurisdiction in the county judge of Wayne county to order their issue, or appoint commissioners for that purpose. That is one of the

legal conclusions of the referee, which passed as an adjudication into the judgment, and is not easily reconcilable with the further decision that the contracts between Parshall and the pretended railroad commissioners were valid. The argument is that the county judge, having no jurisdiction, could render no judgment; and that his order that bonds be issued, and his appointment of commissioners was an absolute nullity; that the latter, therefore, were destitute of any authority to represent the town, and were in no sense or respect its agents; that the bonds consequently were the unauthorized act of strangers and wrong-doers, and absolutely null and void as against the town; and the contracts with the pretended commissioners were necessarily utterly invalid. But this theory seems to us destructive of the plaintiff's whole case, and while it cuts off Parshall's right to credits, at the same time defeats plaintiff's action. Because, if the bonds were bad, and the judgment upon which they rested utterly invalid for want of jurisdiction, so that they were never made by the town at all, either directly or indirectly, it follows that the only right of action against the wrong-doers possible to the town would be an action of tort for the injury done. But there could be no injury beyond the costs and expenses of the town's defense against an attempted enforcement of the bonds, for these, having been issued absolutely without authority — not by the town, but by strangers falsely simulating an authority — could not be enforced against the town unless the latter assented, or forebore its defense. That is the doctrine of this court beyond any question. In *Cagwin v. Town of Hancock* (84 N. Y. 542), we said distinctly that there can be no *bona fide* holders of bonds, within the meaning of the law applicable to negotiable paper, which have been issued without authority. No possible injury could, therefore, result to the town, except, as we have said, the costs of a successful defense. It did not appear upon the trial that the town of Lyons had paid a single dollar upon a single bond. When the trial of the main question ended at the interlocutory judgment, no evidence had been given that the town had been compelled to pay, or had actu-

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ally paid any thing on account of these bonds. At that stage of the litigation there had not even been shown the existence of any suit or proceeding against the town growing out of these bonds, so far as we have been able to ascertain from the abundant mass of matter in the printed case, except the judgment in favor of Munson in the United States Circuit Court for about \$14,000, which the referee certifies to us was taken by writ of error to the Supreme Court, and a bond given to work a *supersedeas* of that judgment, and that the action remained undetermined in the appellate court. There was no proof that this judgment had been paid, and it is quite certain that it had not. So that, in rendering the interlocutory judgment, the plaintiff would necessarily have been defeated had it stood upon the ground now taken, for, on the theory that the whole proceedings were utterly null, the case became simply that of a suit against wrong-doers, guilty of a tort in simulating bonds of the town; but with no proof of any damage sustained by or resulting to the town as a consequence of the wrong. There was no loss or injury to be compensated. It had not yet occurred.

The answer attempted is that some of the bonds were proved to have been sold, and presumably were in the hands of *bona fide* holders, and these might enforce them in the Federal courts. Passing by the obvious impropriety of assuming in advance that these courts would decide in the future what, as we view it, is not the law, we are quite sure that they have asserted no such doctrine in the past. We have disagreed, and may continue to disagree, with some of their conclusions as to the rights of *bona fide* holders of municipal bonds, but they have held nothing that we cannot respect, while we do not agree. They have ruled, substantially, that where a municipal corporation has been empowered by law to issue bonds, and through its agents or officers has made such bonds, any error or irregularity in the issue is unavailable against the innocent holder for value; that, as against such holder, the determination of the tribunal or officer charged with the duty of ascertaining whether or not conditions precedent have been performed

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is conclusive upon the corporate obligor, and cannot be attacked collaterally; and that by a recital in the bonds of such due performance, or by accepting or retaining the stock given in exchange, the corporation is estopped from denying the validity of its apparent obligations. But all this was said of cases in which the town, by those who could be deemed its agents, had made what purported to be its obligations. (*Commissioners of Knox Co. v. Aspinwall*, 21 How. [U. S.] 539; *Moran v. Commissioners of Miami Co.*, 2 Black, 722; *Bissell v. Jeffersonville*, 24 How. [U. S.] 287; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Mercer Co. v. Hacket*, id. 83; *Rogers v. Burlington*, 3 id. 654; *Cincinnati v. Morgan*, id. 275; *Meyer v. Muscatine*, 1 id. 385; *Supervisors v. Schenck*, 5 id. 772; *Pendleton Co. v. Amy*, 13 id. 297; *Orleans v. Platt*, 99 U. S. 676.) It has never yet been said that where the corporation had done nothing; where strangers and wrongdoers, having no shadow of authority, had boldly simulated its bonds; that a recital in the latter of a falsehood would estop the town, or the false bonds be enforceable against it. (1 Dill. on Mun. Corp. 511, note; *Township of East Oakland v. Skinner*, 4 Otto, 255; *Steines v. Franklin Co.*, 48 Mo. 167; 8 Am. Rep. 87.) On the contrary, the Federal court has held to the doctrine that where the authority to act is solely conferred by statute, which in effect is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which they rely is within the power under which the agent acts. (1 Dill., *supra*, § 419; *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton Co.*, 10 id. 676.) And that court has not held, nor is it likely to hold, that anybody is estopped by the acts of strangers and trespassers, never assented to, nor silently observed when there was a duty to speak. Here, then, on the appellant's theory, was a case where the county judge had no jurisdiction; where, under the statute, he had no power to decide; where his record was equally open to everybody's observation, and, as was said by DWIGHT, J., at Special Term, on the application for a *mandamus*, its nullity was apparent on the face of the papers; where his order to issue

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bonds, and his appointment of commissioners were totally void; where their acts did not, and could not, bind, or even represent, the town; and where the bonds they made were wholly their own, and merely simulated obligations of the town. We decline to believe that on such a state of facts the Federal court would hold the town of Lyons liable on the bonds, or estopped by the falsehood of the wrong-doer. But it is said on the argument that it has done so, and we are referred to *Lyons v. Munson* (99 U. S. 684). That case decided nothing of the kind. On the contrary, what it did decide reveals at once the vice of the appellant's position. The court held in that case that the county judge "unquestionably had jurisdiction," and that his judgment could not be attacked collaterally for error or mistake, but remained conclusive, like any other judgment, until reversed in a direct proceeding. Who is right and who is wrong in this conflict of authority it is not necessary to consider, for we are reasoning now on the assumption that no jurisdiction existed, for the purpose of testing the bearing of that position upon the present case. When, therefore, the Federal court held that the county judge had jurisdiction, and his judgment unreversed was conclusive, it followed as a corollary that the bonds were good, the commissioners agents of the town, and their contracts with Parshall capable of being made. And it thus becomes apparent that the appellant's argument and its asserted result are founded upon an inconsistency. The bonds are valid to get a basis for a recovery against Parshall, and are invalid to cut off his equities and increase the recovery. This cannot be permitted. The plaintiff's case must be consistent with itself. It cannot stand upon two contradictory propositions. One theory or the other is false. Both cannot be true, and we cannot sustain a recovery by mingling falsehood with truth. There was jurisdiction, or there was not; the bonds were good or were void; the commissioners were agents of the town, or mere strangers and wrong-doers. The plaintiff must choose one of these alternatives, and cannot weave both into its fabric. Having chosen, it must adhere to it all through the case, and take the logical consequences upon

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every issue. The town is here with a verdict in its favor of over \$30,000, and complaining, not of that recovery, but that it is not large enough. If its theory of the utter nullity of the bonding proceedings is to test its rights, it has sued wrong-doers for simulating its bonds and recovered \$30,000 damages, without proof of having suffered the loss of a single dollar, and when on its own theory it never could be made to lose any thing except the expenses of its defense, which are nowhere proved in the case. The pressure of this difficulty must have been felt by the learned counsel for the appellant when he was compelled to insist in his brief that "as it appeared when he" (Parshall) "was sworn, that he had sold \$76,008.49 of" the bonds, "equity requires him to pay that sum to the town to *indemnify* it against his unlawful act." Apparently this would require us to say that money may be recovered before a loss has occurred, as a precaution against such future possibility. We think, therefore, that the plaintiff's theory is suicidal. Instead of sustaining a claim that larger damages should have been awarded, it shows that too much has already been given.

Of course it is now easy to see that the recovery went on an entirely different ground, and the plaintiff all through the trial stood upon the theory that the bonds, if not in fact good by the law of the State, were so by that of the Federal courts, and could be so treated in the hands of Parshall and as against him. He could not assert the invalidity of the bonds, nor deny his liability as trustee. He had voluntarily taken a position which estopped him from doing either, and the town was at liberty, even though the bonds were void under the State law, to submit to the rule of the Federal court, to treat them as good, to assume a liability and compel the trustee to account on that basis. What it tried to do at one and the same time was to resist the liability of the town on the ground that it had issued no bonds, and at the same time collect the proceeds of their sale from the wrong-doer; in other words, to repudiate the bonds and yet obtain their proceeds.

It is probable that the complaint was drawn on a supposition that the whole issue of bonds was in the hands of Parshall, and

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that none had been sold. The relief asked was that they be delivered up to the town to be canceled. On the trial the fact that some had been sold was developed. In view of that fact it was necessary for the town to determine its line of action against Parshall. It could not claim from him the proceeds of the bonds sold without conceding their issue and sale, and adopting as the law of the case the Federal doctrine which made them good and so made the town liable. On no other ground could it entitle itself to such proceeds, for its sole right to them came from that concession, and an affirmance of the action of the commissioners in making their contract. The only other alternative was to treat Parshall as a stranger and wrong-doer, and ask damages for the tort. With this alternative before it the town made its choice. It demanded and is still demanding the proceeds of the sale. It is before us now claiming to recover the whole of such proceeds, and appealing because it has got only a part. It put in evidence on the original hearing the bonding papers and Parshall's agreement with the commissioners; proved his possession of the bonds under it; showed what he had sold and what remained; established the insolvency of the railroad company, and the sale of its property on mortgage foreclosure, as well as its non-performance of the conditions on which alone it was entitled under the trust agreement to receive the bonds from the trustee; when the interlocutory judgment was reached, filed no exceptions to the report of the referee adjudging the validity of the agreements and Parshall's liability under them; and even after the accounting, upon the final submission to the referee, in its requests to find, it continually spoke "of the unreturned bonds and coupons *of the plaintiff*, and the proceeds thereof"; of the "overdue coupons *of the plaintiff*;" of the "disposition or expenditure of *the plaintiff's bonds*, or the proceeds thereof by said defendant;" and claimed that "the defendants have not in good faith laid out and expended any of the *plaintiff's bonds*;" and that "Parshall is liable for the par value and accrued interest on *all outstanding bonds and coupons of the plaintiff* sold or transferred by him, * * * which is the sum of \$76,008.59." In all

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this the ground upon which the case was tried and the decision rested is very apparent. The plaintiff has had the benefit of the Federal law in making Parshall liable for the proceeds of the bonds, and must not now be permitted to retain that benefit and deny to Parshall the application of the same law. He cannot be permitted to invoke one rule to recover the proceeds, and a contrary one to defeat Parshall's equity. We must hold the plaintiff to the position which it deliberately selected and on which alone its recovery can stand. And we must do that for the further reason that the ground it now takes shows that it has not the least reason to complain of the verdict which its position on the trial enabled it to secure.

But the appellant makes other objections which are claimed to be good even though the case stands upon the theory we have sustained.

The allowance of commissions to Parshall is criticized. The argument against them goes very largely upon the ground already disposed of, that the town was not bonded at all and therefore Parshall could not be a trustee, and upon the further ground that the referee erred in finding that he acted in good faith throughout the transaction. We must be content with the referee's finding in the latter respect. The question was one of fact, and depended upon the inferences to be drawn from the circumstances taken together. Parshall acted as trustee, and his possession of the bonds was in that character and that only. Assuming that he acted in good faith and did nothing to forfeit his right to commissions, their allowance was proper.

Certain items in the account depend upon the second or modified agreement of the commissioners, which is claimed to have been invalid mainly upon two grounds; first, that the power of the commissioners to contract was already exhausted; and second, that the last agreement was not signed by the railroad company. The commissioners were authorized to agree with the company upon the mode and conditions upon which the bonds or their proceeds were to be delivered. (Laws of 1870, chapter 507.) They made such agreement providing that the intermediate trustee should deliver the bonds or their pro-

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ceeds only as the progress of work through the county of Wayne should justify such expenditure. At a later period, the commissioner, becoming satisfied that it was "for the interest of the town of Lyons that the bonds or their proceeds should be applied to the building and constructing of the railroad of said company from its intersection with the Lake Ontario Shore railroad to a suitable point at or near the village of Geneva," gave a written authority to Parshall to pay out the bonds and for such construction. This permitted payment to be made for work done in Ontario county as well as Wayne and was practically a modification of the original agreement, or a waiver in writing of the condition limiting the expenditure to Wayne county. Most certainly the trustee who acted in accord with the written consent of the agents of the town is entitled to be protected in what he did upon the faith of that consent.

Some other objections are made to the allowances in the account which we have carefully considered but do not need to discuss. We find no error to justify a reversal.

The judgment should be affirmed, with costs.

All concur for affirmance, except TRACY, J., dissenting.

Judgment affirmed.

ROBERT DUNLOP Respondent, v. EGBERT I. AVERY, Impleaded,
etc., Appellant.

The rule that where a mortgagor has covenanted in his mortgage to keep the buildings upon the mortgaged premises insured for the benefit of the mortgagee, any insurance effected in the name or for the benefit of the former will be presumed to be in fulfillment of the covenant, and that the latter has an equitable lien upon the insurance money, does not apply when the policy itself provides for the payment of the loss to another incumbrancer.

The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it.

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Such a covenant is not one running with the land, but is entirely personal in its character.

Where, therefore, after the execution of two mortgages upon the same premises, each of which contained such a covenant, the mortgagor procured a policy, by the terms of which any loss was made payable to the junior mortgagee, to whom the policy was delivered, and who, until after a loss, had no actual notice or knowledge of the covenant in the senior mortgage, *held*, that as the legal title was in the junior mortgagee, the equities being equal, such title must prevail; and that he was entitled to the insurance moneys.

Also *held*, that the fact that the provision in the policy making the loss payable to the junior mortgagee was inserted at his request or by his procurement did not, in the absence of any proof of fraud, affect his rights.

It seems that even had it appeared that the junior mortgagee had notice of the insurance clause in the senior mortgage, in the absence of notice to him that it had not been performed, his rights would not have been affected.

Dunlop v. Avery (23 Hun, 509), reversed.

(Argued June 16, 1882; decided October 10, 1882.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made March 21, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 23 Hun, 509.)

This action was brought to foreclose a mortgage to secure \$2,000, executed December 1, 1870, by defendants Chapman W. Avery and wife upon certain premises situate in the village of Jamesville, Onondaga county.

The mortgage contained a covenant on the part of Avery to keep the buildings upon the premises insured for \$2,000, loss, if any, payable to the mortgagor. Said mortgage was duly recorded on the day of its date. Avery, in compliance with the covenant, kept the buildings insured for the benefit of plaintiff until November 16, 1874, when the policy expired. He then took out a policy in his own name for \$2,000, omitting the clause making the loss payable to plaintiff. On March 6, 1875, said Avery executed to defendant Egbert I. Avery a mortgage upon the same premises for the sum of \$1,400, which mortgage contained a covenant on the part of the mortgagor to keep the

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premises insured for \$3,000, loss, if any, payable to the mortgagee, and soon after, at the request of the parties to said mortgage, the insurance company wrote in said \$3,000 policy a provision making the loss payable to said Egbert. On November 13, 1875, when said policy expired, said Chapman procured another for \$2,000, loss, if any, payable to Egbert, which was delivered to the latter, and was renewed in 1879, the premiums being paid by Chapman. On October 13, 1877, the buildings were destroyed by fire. The referee found that Egbert had no actual notice or knowledge that plaintiff's mortgage contained said covenant until after the fire. The only question litigated was as to the right to the insurance money. The referee held that plaintiff had the priority of right, in case of any deficiency, to the extent of such deficiency.

D. Pratt for appellant. When the owner of the equity of redemption of mortgaged premises procures them to be insured for his own benefit, the mortgagee has no interest in the insurance money in case of loss, although the former was personally liable for the mortgage debt. (*Carter v. Rockett, and the N. Y. Fire Ins. Co.*, 8 Paige, 437; Angell on Insurance, § 60.) Where a mortgagor is bound by contract to keep the premises insured for security to the mortgagee, the latter will have, as between him and the mortgagor, an equitable lien for money received upon a policy issued to the mortgagor, to the extent of the interest of the mortgagee. (Angell on Insurance, § 62; *Thomas, adm'r, v. Van Kapff, ex'r*, 6 Gill. & Johns. 372; *Vernon v. Smith's Ex'rs*, 5 Barn & Ald. 1.) Where the equities are equal, the legal right must prevail. (1 Story's Eq. Jur., § 64 C; *Fitzsimmons v. Ogden*, 7 Cranch, 2 to 18; *Newton v. Clark*, 41 Barb. 285; *Grinstone v. Carter*, 3 Paige, 481; *Cromwell v. The Brooklyn Fire Ins. Co.*, 44 N. Y. 42-47; *Wheeler v. The Ins. Co.*, 11 Otto, 439.) The defendant Egbert is not chargeable in this case with notice of plaintiff's equity, as no notice is alleged in the complaint and none was proved on the trial. (*Stuyvesant v. Hall*, 2 Barb. Ch. 151, 155; *Howard Insurance Company v. Halsey*,

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8 N. Y. 273; *Talmadge v. Wilgers*, 4 Edward, 239.) The record of Dunlop's mortgage, if notice of the existence of the mortgage itself, is not notice of the insurance clause. (Willard's Equity, 256; Bispham's Equity, § 271; *Pitcher v. Barrows*, 17 Pick. 361; *Boggs v. Varner*, 6 Watts & S. 469; 2 Bosw. 178; *Gillig v. Maas*, 28 N. Y. 191.) The covenant in this case is purely personal, in nowise affecting the land, and therefore collateral and not running with the land. (*Masury v. Southworth*, 9 Ohio St. 340; *Douglass v. Murphy*, 16 U. C. Q. B. 113; *Keteltas v. Coleman*, 2 E. D. Smith, 408, affirmed in Ct. of App.; Platt on Covenants, 183; 3 Law Lib. 181; Platt on Leases, 226-228; *Clark v. Wells*, 3 Wilson, 25; 17 Wend. 136, 150; *Spencer's Case*, 5 Coke, 15a; *Norman v. Wells*, 17 Wend. 138, 150.)

H. Burdick for respondent. The covenant by the mortgagor to insure the buildings for plaintiff's benefit was the main security for the loan and, in the event of the destruction of the buildings by fire, gave plaintiff an equitable lien on the insurance money under any policy procured and paid for by the mortgagor on the buildings covered by the mortgage. (*Carter v. Rockett and N. Y. Fire Ins. Co.*, 8 Paige's Ch. 437; *Cromwell v. The Brooklyn Fire Ins. Co.*, 44 N. Y. 42.) The covenant to insure, being incorporated in the mortgage and recorded, became properly a part of the record, and constructive notice to any subsequent incumbrancers or purchasers. (*Truscott v. King*, 2 Seld. 147, 161; 2 Lead. Cases in Equity, 168-9; *Ackerman v. Hunsicker et al.*, 85 N. Y. 43; *In re Sands*, 3 Bissell [Dist. Ct. U. S.], 175; 39 Barb. 227.) A recital in a deed forming a link in the chain of title, of any facts which should put a subsequent grantee or mortgagee upon inquiry and cause him to examine other matters by which a defect in the title would be disclosed, is constructive notice of such defect. (*Acer v. Wescott*, 46 N. Y. 384-392; *Youngs v. Wilson*, 27 N. Y. 354.) Egbert I. Avery took his mortgage with the imputed knowledge which the prior record of the plaintiff's mortgage imposed upon him. (*Trus-*

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cott v. King, 2 Seld. 161 ; 2 Leading Cases in Equity, 168.) Plaintiff's legal and equitable lien is prior and superior to the defendant Egbert Avery's. (3 Paige, 436.)

MILLER, J. The first mortgage executed to the plaintiff as well as the one afterward executed to the defendant Egbert I. Avery, each contained a covenant to keep the buildings upon the premises insured, and that the loss, if any, should be paid to the several mortgagees. In the policy first taken for \$2,000, the loss was made payable to the plaintiff. Subsequently another policy was issued for \$3,000, without being made payable to the plaintiff, and after this a mortgage was executed to the defendant Egbert I. Avery, and a new policy was issued for the same amount, and the loss made payable to Egbert I. Avery, as his interest might appear. At this time all parties were amply secured. At a later date upon the expiration of the last-named policy of \$3,000, another policy was issued for \$2,000, loss, if any, payable to said defendant, which was delivered to and kept by him, and he thus became vested with the legal title to the same. Under these circumstances the question arises whether the plaintiff had such an equitable right to the money arising from the policy as entitled him to a priority over the defendant to whom the loss was made payable. The claim of the plaintiff rests upon the covenant by the mortgagor contained in the mortgage to him to insure the buildings, which, it is insisted, was given as security and part of the agreement for the loan, and which, in connection with the insurance, was a lien upon the buildings and a part of the mortgage lien on the land and buildings and the insurance money arising from the buildings in the event of their destruction or loss by fire. This position was sustained by the trial court, and the opinion of the General Term holds that Egbert I. Avery took the mortgage with imputed knowledge and notice of the covenant to insure which was contained in the record of the plaintiff's mortgage. We do not concur in this view, and are unable to perceive how the prior mortgage could without especial notice of its contents deprive the defendant of the

right to the money under the policy which was payable to him. There is no doubt as to the correctness of the rule that when the mortgagor is bound by the terms of the mortgage to keep the premises insured for the security of the mortgagee, that as between him and the mortgagee an equitable lien arises in favor of the mortgagee for the money received upon the policy to the extent of the mortgage. In the case considered both parties had mortgages with similar covenants and if the policy had been sufficiently large the property furnished ample security for the loans. Had both been equally vigilant no loss would have accrued to either. The plaintiff failed to make provision by which the insurance was kept up so as to cover his mortgage. For three years he neglected that duty, while it may be assumed that the defendant was sufficiently alert to see that his mortgage was secured by a policy providing for payment to him in case of loss. The plaintiff could have been secured had he given the subject due attention. He failed to keep the policy alive, as he had a perfect right to do at the expense of the property under the covenant on this mortgage and the loss was caused by his fault and neglect.

The title to the insurance money under the provision in the policy was in the defendant, and the equities being equal between the parties, the legal title must prevail. (*Newton v. Clark*, 41 Barb. 285; *Grimstone v. Carter*, 3 Paige, 421.) The equity of the plaintiff rests upon the covenant in the mortgage as to the policy of insurance. The defendant stands in precisely the same position with a right to the insurance money in case of the loss under the same, and thus his right is a superior one. The rule that when the mortgagor covenants to keep the buildings insured for the benefit of the mortgagee, that any insurance which may be effected in the mortgagor's own name or for the benefit of the mortgagor will be presumed to be in fulfillment of his covenant is well established, but this presumption arises only in the absence of proof to the contrary, and this is not the legal presumption when the policy itself provides for the payment of the loss to another incumbrancer.

The case of *Cromwell v. The Brooklyn Fire Insurance Co.*

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(44 N. Y. 42; 4 Am. Rep. 641); which is relied upon by the plaintiff's counsel, is not in conflict with this doctrine, but fully sustains it. In that case the plaintiff was the assignee of a vendor's interest under a contract for the sale of real estate which provided for an insurance by the vendee, for the benefit of the vendor, and it was held that he was equitably entitled to the moneys due upon a policy of insurance procured by the vendee in his own name. The same principle was upheld in *Carter v. Rockett* (8 Paige, 437). Neither of these cases furnish any ground for the rule that where the policy provides for the payment of loss to a subsequent mortgagee that a prior mortgagee can claim the insurance money. There was no fraud on the part of the defendant and nothing was unjust or inequitable in taking an insurance which covered the amount of his loan upon property which was of sufficient value to secure both of the mortgagees. Much more is the defendant entitled to priority, in view of the finding of the referee, that the defendant had no knowledge or notice of the covenant in the mortgage to the plaintiff to keep the premises insured for his benefit.

The counsel for the defendant cites several cases which, it is claimed, uphold the doctrine that the covenant to insure being included within the terms of the mortgage as much as other provisions is a material and necessary provision pertaining to the realty and affects the same, and becomes properly a part of the record and constructive notice to any subsequent incumbrancers or purchasers. (*Truscott v. King*, 2 Seld. 147; *Ackerman v. Hunsicker*, 85 N. Y. 43; 39 Am. Rep. 621.) These cases have no relation to a covenant to insure, and do not bear directly upon the question here presented, but upon the effect to be given to judgments and mortgages under the Recording Act in reference to subsequent incumbrancers and purchasers. The Recording Act has, we think, no application to the covenant in question and notice of the covenant must depend upon proof without reference to its provisions. It does not contemplate that such a covenant in a mortgage shall be more effective from the fact, that such mortgage is placed on the record, or that the re-

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ording makes it an incumbrance upon the mortgaged property. The object of the Recording Act was to protect subsequent purchasers and incumbrancers against previous unrecorded instruments, and not against a covenant relating to the policy of insurance upon buildings upon the premises. Instruments which affect the land and the title to the same only are entitled to record, and not such as relate to collateral matters. (*Gillig v. Maass*, 28 N. Y. 191.) Nor is there any force in the position that the covenant to insure runs with the land, and hence no assignment was required of the policy. *In re Sands* (3 Bissell [U. S. D. C.], 175) so far as it upholds such a doctrine it is not, we think, well founded. The covenant in question is entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage. A conveyance of the land by the mortgagor would not, we think, render the vendee liable on the covenant. (See Platt on Covenants, 183 ; 3 Law Lib. 181 ; Platt on Leases, 226-228 ; *Newman v. Wells*, 17 Wend. 150.) Nor is there any valid ground for the contention that the covenant in the mortgage operated as constructive notice.

Upon no sound principle was the defendant bound to examine the record, and thus become acquainted with the terms and conditions of the first mortgage, and the covenant as to insurance, and his omission to do so is not such neglect as gave priority to the plaintiff's claim for the insurance money. Even if it was established that the defendant had notice of the insurance clause in the mortgage, as he had none, that it had not been performed, it is not apparent how he could be made chargeable. Nor are the rights of the defendant affected even, although the provision in the policy making the loss payable to him was inserted at the request or by the procurement of the mortgagee. The mortgagee had the right to procure such a provision in his own favor, and so long as it was done without notice of the covenant in favor of the plaintiff in his mortgage, and without fraud on his part, it was legal and valid. The act itself was not fraudulent on its face and

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cannot deprive the defendant, in the absence of proof of any intention to commit a fraud, of the rights secured thereby.

No other point made requires examination, and we think that the referee erred in directing a judgment in favor of the plaintiff, and the General Term also erred in affirming the same, and such judgment should be reversed so far as it relates to the application of the insurance money, which should be awarded to the defendant Egbert I. Avery, with costs against the respondent personally.

All concur.

Judgment accordingly.

MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

THOMAS E. KINNEY, Respondent, *v.* ELLIS H. ROBERTS & Co.,
Appellant.

(Argued April 11, 1882; decided April 18, 1882.)

(Reported below, 26 Hun, 166.)

W. N. Matteson for appellant.

E. D. Mathews for respondent.

Agree to dismiss appeal. No opinion.
All concur, except RAPALLO, J., absent
Appeal dismissed.

WATSON C. SQUIRE et al., Respondents, *v.* HENRY VILLARD,
Appellant.

(Argued April 11, 1882; decided April 18, 1882.)

Artemus H. Holmes for appellant.

Wm. B. Hornblower for respondents.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

FRANCIS H. SALTUS, Appellant, *v.* ELLIOTT F. SHEPARD, as
Trustee, etc., et al., Respondents.

(Argued April 10, 1882 ; decided April 25, 1882.)

Robert F. Little for appellant.

E. Ellery Anderson, Thomas H. Hubbard and *George E. Horne* for respondents.

Agree to affirm. No opinion.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

GEORGE W. TOMPKINS, Appellant, *v.* ALFRED F. SMITH et al.,
Respondents.

(Argued April 11, 1882 ; decided April 25, 1882.)

L. E. Chittenden for appellant.

Douglas Campbell for respondents.

Agree to affirm. No opinion.

All concur, except MILLER, J., dissenting, and TRACY, J.,
not voting.

Order affirmed.

WATSON C. SQUIRE et al., Respondents, *v.* HENRY VILLARD,
Appellant.

(Argued April 11, 1882 ; decided April 25, 1882.)

Artemus H. Holmes for appellant.

Wm. B. Hornblower for respondents.

Agree to affirm. No opinion.

All concur.

Order affirmed.

SUSAN LATHAM, Appellant, *v.* HARRIET BOVEE et al., Respondents.

(Argued April 14, 1882; decided April 25, 1882.)

Edwin H. Risley for appellant.

E. D. Matthews for respondents.

Agree to affirm. No opinion.

All concur, except RAPALLO, J., absent, and TRACY, J., not voting.

Judgment affirmed.

ERNEST L. DERAISMES et al., Respondents, *v.* MARTHA E. DERAISMES et al., as Trustees, etc., Appellants.

(Argued March 20, 1882; decided May 2, 1882.)

Charles A. Jackson for appellants.

William H. Onderdonk for respondents.

Agree to affirm without opinion.

All concur, except ANDREWS, Ch. J., absent.

Order affirmed.

ELMINA COFFIN, as Administratrix, etc., Respondent, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY, Appellant.

(Argued April 18, 1882; decided May 2, 1882.)

Nathaniel C. Moak for appellant.

E. Countryman for respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

**FRANCIS H. N. WHITING et al., Appellants, v. THE CITY BANK
OF ROCHESTER, Respondent.**

(Submitted April 21, 1882 ; decided May 2, 1882.)

THIS case, upon a former appeal, is reported in 77 N. Y. 363. The court there held, that the trial court erred in refusing to submit to the jury the question of mistake on the part of defendant in remitting draft to pay note sent to it by plaintiffs for collection. Upon the second trial the question was submitted to the jury and decided in favor of the defendants, upon evidence which the court here deem sufficient. Aside from this, the opinion simply reiterates the legal propositions laid down upon the former appeal.

John Van Voorhis for appellants.

James Breck Perkins for respondent.

MILLER, J., reads for affirmance.

All concur, except TRACY, J., absent.

Judgment affirmed.

**JEROME MESSINGER, as Executor, etc., Respondent, v. I. NEW-
TON MESSINGER et al., Appellants.**

(Argued April 25, 1882 ; decided May 2, 1882.)

Nathaniel C. Moak for appellants.

B. F. Chapman for respondent.

Agree to dismiss appeal without opinion.

All concur.

Appeal dismissed.

In the Matter of the Petition of JOHN PAINE to Vacate an
Assessment.

(Argued April 25, 1882 ; decided May 2, 1882.)

(Reported below, 26 Hun, 431.)

J. A. Beall for appellant.

John C. Shaw for respondent.

Agree to affirm without opinion.

All concur.

Order affirmed.

JOHN H. KIERSTED et al., Respondents, v. HARRIET M. WEST
et al., as Administrators, etc., Appellants.

(Argued April 24, 1882 ; decided May 5, 1882.)

A. Taylor for appellants.

Arthur More for respondents.

Agree to affirm. No opinion.

All concur, except TRACY and MILLER, JJ., absent.

Judgment affirmed.

MECHANICS & TRADERS' NATIONAL BANK, Respondent, v. HUGH
R. HEALY, Impleaded, etc., Appellant.

(Argued April 25, 1882 ; decided May 5, 1882.)

Samuel Hand for appellant.

Luke A. Lockwood for respondent.

Agree to dismiss appeal. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Appeal dismissed.

THOMAS KELLEY, Respondent, *v.* JAMES J. McMAHON, Appellant.

(Argued April 25, 1882 ; decided May 5, 1882.)

E. D. Northrup for appellant.

G. M. Rider for respondent.

Agree to dismiss appeal. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Appeal dismissed.

FITZHUGH SMITH, Respondent, *v.* LAURENT J. TONNELE, Appellant.

(Argued April 25, 1882 ; decided May 5, 1882.)

C. W. Pleasants for appellant.

Nathaniel C. Moak for respondent.

Agree to dismiss appeal. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Appeal dismissed.

THE FARMERS' LOAN AND TRUST COMPANY, as Receiver, etc.,
Respondent, *v.* SARAH JAMES et al., Appellants.

(Argued April 25, 1882 ; decided May 5, 1882.)

E. Countryman for appellants.

David McClure for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

JACOB RANDOLPH, Respondent, *v.* CORNELIUS J. BERGEN et al.,
Appellants

(Submitted April 25, 1882; decided May 5, 1882.)

THIS action was brought by a judgment creditor to set aside a transfer of real estate as fraudulent. The Special Term found, upon evidence deemed by the court here fully sufficient that the transfer was fraudulent in fact.

A. & J. Z. Lott for appellants.

Wm. J. Gaynor for respondent.

FINCH, J., reads for affirmance.

All concur, except TRACY, J., taking no part, and MILLER, J., absent.

Judgment affirmed.

THE MANHATTAN SAVINGS INSTITUTION, Respondent, *v.* KATHERINE NORTON and HENRY ALLEN, purchaser, Appellant.

(Argued April 25, 1882; decided May 5, 1882.)

Edward S. Rapallo for appellant.

Samuel Hand for respondent.

Agree to affirm on opinion of court below.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

JEREMIAH CROWLEY, Appellant, *v.* THE ROYAL EXCHANGE
SHIPPING COMPANY (Limited) of LONDON, Respondent.

(Submitted April 25, 1882; decided May 5, 1882.)

Edward D. McCarthy for appellant.

Butler, Stillman & Hubbard for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

FRANCIS TIMONEY, Respondent, *v.* CORNELIUS CALLAHAN, Appellant.

(Argued April 27, 1882 ; decided May 5, 1882.)

Benj. F. Smith for appellant.

Francis Larkin for respondent.

Agree to affirm. No opinion.

All concur, except MILLER, J., absent.

Judgment affirmed.

GEORGE W. RIGGS et al., Respondents, *v.* JAMES PURSELL et al., Appellants.

(Argued April 26, 1882 ; decided May 5, 1882.)

THIS was an action to foreclose a mortgage.

In the spring of 1873 defendant Pursell conceived the project of building in the city of New York a theatre, upon land owned by him, which, when completed, was to be leased for a term of years to William Stuart, a theatrical manager. Dion Boucicault, an actor and theatrical writer, a friend of Stuart, also became interested in the project and agreed to loan Pursell \$20,000 to aid him in building the theatre. Afterward Boucicault, not being able or ready to loan the money, it was arranged that the plaintiffs should make the loan. For the purpose of consummating the arrangements Pursell, Boucicault

and Stuart, on the 9th day of May, 1873, met at the office of an attorney in the city of New York, and there Purssell executed and delivered to Stuart a lease of the theatre to be erected, for a term of years at a stipulated rent. As the plaintiffs desired the personal security of Boucicault for the loan, it was arranged that a bond and mortgage should be executed to him and then assigned by him to the plaintiffs; and a bond and mortgage were so executed, to secure the payment of the \$20,000, and they were assigned by Boucicault to the plaintiffs with his guaranty of payment thereon. At the same time Purssell executed and delivered to the plaintiffs a declaration in which he declared that he had "no legal or equitable defenses, offsets, or counter-claims against the said bond and mortgage, or against the payment of the sum therein and thereby secured, or any part thereof, with the interest at the times and in the manner therein stipulated;" and it was recited in the declaration that it was executed for the purpose of inducing the plaintiffs to accept the assignment of the bond and mortgage, and to pay the consideration money for such assignment. At the same time Purssell assigned to the plaintiffs, as collateral security for the payment of the bond and mortgage, all the rents reserved in the lease to Stuart, and authorized them to collect and receive the rents and apply them upon the bond and mortgage, until they should be fully paid and satisfied. At the same time there was also executed a tripartite agreement between Boucicault of the first part, Purssell of the second part and Stuart of the third part in which it was agreed that Stuart should pay the rents of the theatre, as they accrued, during the term of the lease, to the plaintiffs as agents and trustees of Boucicault, until such time as the payments of rent should amount to the sum due upon the bond and mortgage, and that Boucicault should then discharge and satisfy the mortgage. And Purssell agreed that the rents might be so paid and should be regarded as if paid to him and on his account; and it was further agreed that in case Stuart failed to pay the rents reserved in the lease, Purssell should then assign and transfer them and his claim for them to Boucicault, who

was thereupon to indorse the amount of rent, so assigned, upon the bond and mortgage, as a payment thereon.

The controversy between the plaintiffs and Purssell, who alone appealed, mainly grows out of this tripartite agreement, Purssell claiming that certain rents, which were unpaid by Stuart, should have been indorsed upon the mortgage.

The court say: "Upon the facts disclosed at the trial, we are of opinion that this claim is not well founded.

The plaintiffs did not occupy the position of assignees of the mortgage in such a sense that they took subject to any equities or defenses which Purssell had, at the time of the assignment, against Boucicault. The mortgage had no inception in the hands of Boucicault; he advanced no money on it, and there never was a time when he held it as security for any money. At the time it was executed it was not understood that he should loan any money on it, but the understanding was that the loan, on the security of the mortgage, was to be made by the plaintiffs to the mortgagor. The mortgage first had an inception, and became valid as a security, when, with the assignment, it was delivered to the plaintiffs, and they advanced their money upon it. It took the form of a mortgage to Boucicault, simply that the plaintiffs might have his guaranty of payment thereon, and the effect of the whole transaction is not otherwise than it would have been if the mortgage had been executed directly to the plaintiffs, and Boucicault had then guaranteed the payment thereof, or executed his bond as collateral thereto. The plaintiffs loaned their money directly to Purssell, the mortgagor, upon all the papers then delivered to them, to-wit: the bond and mortgage, the assignment, Purssell's written declaration, and his assignment of the rents. Under such conditions, aside from the estoppel furnished by the written declaration, Purssell could not interpose, as a defense to the mortgage, any defense, legal or equitable, which he could have interposed if the mortgage had had an inception in the hands of Boucicault on account of money loaned by him. Purssell borrowed the money of the plaintiffs on these papers, and is bound to pay them unless he has a defense against them.

Besides, the declaration of Purssell, signed and delivered at

the time, estops him now from assailing the mortgage, or interposing any defense, legal or equitable, thereto. Such was the plain intention of the parties, and nothing stands in the way of giving effect to such intention. The plain purpose of the declaration was to convey an assurance to the plaintiffs, upon which they could rely, that the mortgage was a good and valid security for the whole amount thereof.

If the plaintiffs, however, had known of the tripartite agreement, it may be that they would be held to have assented thereto; and it also may be that they could not claim the benefit of the estoppel furnished by the declaration; but it is impossible to perceive how that agreement, unknown to them, and to which they never assented, could in any way affect them. The court, at Special Term, found that the plaintiffs had no knowledge, whatever, of that agreement, and we are of opinion that there was abundant evidence to sustain that finding. The tripartite agreement, therefore, furnishes to the defendant no defense whatever in this action.

The plaintiffs incurred no responsibility in consequence of the assignment to them of the rents to become due under the lease from Purssell to Stuart; they were to take these rents, when paid to them, and apply them on the mortgage; they did not owe Purssell any duty of active diligence in collecting them; they were not bound to take measures to enforce payment of them. They were not requested by the defendants to take any measures to collect them; they did not interpose any obstacles in the way of their collection, and they did nothing whatever to injure or prejudice the rights of Purssell. There was no finding, or request to find, that there was any negligence, or any want of due diligence, on the part of the plaintiffs in collecting the rents, and there were no requests to find that they could have collected the rents, or that Purssell was in any way prejudiced by any negligence on their part. Under such circumstances there is certainly no authority for charging the plaintiffs with rents not received by them."

Thomas G. Ritch for appellants.

John E. Parsons for respondents.

EARL, J., reads for affirmance.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

WILLIAM B. BIDDLECOM, Appellant, v. PLINEY NEWTON, as
Supervisor, etc., Respondent.

(Argued April 20, 1882 ; decided May 30, 1882.)

Francis Kernan for appellant.

Levi H. Brown for respondent.

MILLER, J., reads for affirmance; DANFORTH and RAPALLO, JJ., concur; ANDREWS, Ch. J., concurs in result; EARL and FINCH, JJ., dissent on authority of *First Nat. Bank v. Wheeler* (72 N. Y. 201), and cases therein cited.

Judgment affirmed.

GEORGE W. COE, Respondent, v. ALONZO B. RAYMOND et al.,
Appellants.

(Argued April 26, 1882 ; decided May 30, 1882.)

THIS action was brought in the County Court of Monroe county. The complaint alleged that the defendants were co-partners, doing business as such in the county of Monroe, and claimed to recover the balance due of the purchase-price of a quantity of barley and oats sold by the plaintiff to the defendants. The defendants appeared by their attorney and interposed an answer, which admitted that they were copartners doing business as such as alleged, and that two of them resided at Brockport, in the county of Monroe, but as to each and every other allegation of the complaint they denied the same.

The principal question discussed upon the appeal was as to the jurisdiction of the County Court under section 30, subdivision 1, of the Code of Procedure,* defendants claiming

* See Code of Civil Procedure, § 340, subd. 3.

that the court had no jurisdiction of the subject-matter of the action under said section, as one of the defendants was not a resident of the county. The question was presented upon the trial only by a motion to dismiss the complaint for want of jurisdiction; this was denied. No exception was taken to the ruling.

The court here say: "The complaint here avers jurisdiction, and conceding that the answer denies this important fact it only presents a question of fact for the consideration of the trial court in the first instance, and a question of law upon such fact which the court should be called upon to consider and determine. If there is no conflicting testimony as to the facts then the question of law arises, and that question can only be presented by an exception. If it be not presented then there is nothing for the court on appeal to review. This court cannot look at the facts for the purpose of determining in the first instance as an original question how the case stands upon the law as applicable to the facts, unless the question of law was raised in the court below. And it is not within its province to say, without any point being made to that effect in the trial court, that a certain fact showing a want of jurisdiction appearing the action cannot be maintained for that reason.

As the defendants in the case at bar failed to present the question we have considered, and it does not appear that any exception was taken which presents the same, it does not arise upon the record before us, and the point now urged cannot be sustained."

D. C. Hyde for appellant.

J. Van Voorhis for respondent.

All concur, except TRACY, J., absent.
Judgment affirmed.

ABRAHAM DEBEVOISE et al., Respondents, v. THE PROVIDENCE
AND STONINGTON STEAMSHIP COMPANY, Appellant.

(Argued April 27, 1882 ; decided May 30, 1882.)

THIS was an action to recover a balance alleged to be due for work and materials in putting a patented device known as "spirals" into a boiler of one of defendant's steamships. The answer alleged that the work was done under a special contract, to wit, that the right to compensation was conditioned upon the "spirals" working well. The question as to the terms of the contract was presented as a question of fact on the trial without objection, and parol evidence given on both sides in addition to a written contract. *Held*, that as the question was thus presented, and there was evidence sufficient to sustain the verdict, both as to the contract and as to its performance if as claimed by defendant, it was conclusive here.

Upon the trial it was proved without objection that the "spirals" were taken out, and were stored by defendant upon its own premises, no notice being given to plaintiff of any defect. The court charged that upon the question whether the "spirals" worked well, the fact that defendant did not return them could be considered. *Held* no error ; that if the "spirals" were a failure, and the contract conditional, it would have been natural for defendant to have returned them, and the fact that they were not returned tended to show that it understood the contract to be absolute, or if upon condition, that such condition had not been broken.

Wheeler H. Peckham for appellant.

Edwin Kempton for respondents.

All concur, except TRACY, J., absent.
Judgment affirmed.

JOHANNA GROTH, Respondent, v. THOMAS J. WASHBURN, Appellant.

(Argued May 2, 1882; decided May 30, 1882.)

THIS action was brought to recover damages alleged to have been occasioned by the negligence of defendant's servant.

Plaintiff, while crossing Centre street in the city of New York, was knocked down and run over by defendant's carriage driven by his servant and employed in his business.

The court instructed the jury that plaintiff could not recover unless she "was entirely free from negligence," nor unless "the accident was caused wholly by the negligence of defendant's servant." No exception was made to any portion of the charge, and no request was made for additional instructions. There was evidence showing careless and reckless conduct, or want of skill on the part of the driver. *Held*, that the verdict was not the subject of review here. (*Hoyt v. Thompson*, 19 N. Y. 207; *Marshall v. Smith*, 20 id. 251.)

Charles M. Earle for appellant.

L. E. Gilbert for respondent.

DANFORTH, J., reads for affirmance.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF THE CHURCH OF THE REDEMPTION, Respondent, v. THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF GRACE CHURCH, Appellant.

(Argued May 3, 1882; decided May 30, 1882.)

THIS case on a former appeal is reported in 68 N. Y. 570.

Under the decision there rendered, and as provided in the *remittitur*, an accounting was had as to the personalty to which it was held plaintiff was entitled.

The court here say that all the questions of law involved were determined upon the former appeal, and there was evidence sufficient to sustain the findings of fact, and the court concur in the opinion of General Term in reference thereto.

Aaron J. Vanderpoel for appellant.

C. E. Tracy for respondent.

Per Curiam opinion for affirmance.

All concur, except MILLER and TRACY, JJ., absent
Judgment affirmed.

ASA MOREHOUSE, Respondent, *v.* THE AGRICULTURAL INSURANCE COMPANY, Appellant.

(Argued May 4, 1882 ; decided May 30, 1882.)

A. H. Sawyer for appellant.

Wm. F. O'Neill for respondent.

Agree to affirm, with costs. No opinion.

All concur, except MILLER and TRACY, JJ., absent.
Judgment affirmed.

OLIVER H. DAY, Respondent, *v.* THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

(Argued April 27, 1882, decided May 30, 1882.)

PLAINTIFF conveyed to defendant certain premises under a parol agreement that the latter should deliver to the former, for temporary keeping, all the stock transported on its road eastward from the Niagara river. Defendant, after performing its agreement for a little more than a year, repudiated it. On a former appeal (51 N. Y. 583), it was *held* that as the agree-

ment on the part of defendant was not to be performed within a year, it was void under the statute of frauds, but that plaintiff was entitled to recover the value of the land, less the value of the partial performance. The questions presented on this appeal were principally as to the sufficiency of proof under the rule so declared. The court held that plaintiff made out a case within the law as laid down.

E. C. Sprague for appellant.

T. E. Ellsworth for respondent.

MILLER, J., reads for affirmance.

All concur, except TRACY, J., absent.

Judgment affirmed.

LEOPOLD MICHEL, Respondent, v. ALEXANDER LAIRD, Appellant.

(Argued May 5, 1882 ; decided May 30, 1882.)

George Thompson for appellant.

J. J. Perry for respondent.

Agree to dismiss appeal. No opinion.

All concur, except MILLER and TRACY JJ., absent.

Appeal dismissed.

In the Matter of the Opening of ELEVENTH AVENUE, etc.

(Argued May 30, 1882 ; decided June 6, 1882.)

Henry Woodruff for appellant.

John C. Shaw for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

In the Matter of JOSEPH HUSSON, an Attorney.

(Argued May 30, 1882; decided June 6, 1882.)

Theron G. Strong for appellant.

Amasa J. Parker for respondent.

Agree to affirm on opinion below.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

JULIUS BINDRIM, Appellant, v. PHILIP BRAENDER et al., Respondents.

(Submitted May 31, 1882; decided June 6, 1882.)

Rufus L. Scott for appellant.

Philip L. Wilson for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

In the Matter of the Petition of SUSAN L. ROBERTS, Executrix, etc., to vacate an Assessment.

(Argued May 30, 1882; decided June 6, 1882.)

James A. Deering for appellant.

J. A. Beall for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Order affirmed.

THOMAS B. C. BERRIAN, Respondent, v. JOHN CHETWOOD,
Appellant.

(Argued April 11, 1882 ; decided June 13, 1882.)

Samuel Hand for appellant.

Edward D. McCarthy for respondent.

Agree to dismiss appeal. No opinion.

All concur, except ANDREWS, Ch. J., and TRACY, J., who do not vote.

Appeal dismissed.

JOHN T. WILSON, Respondent, v. HELEN M. SIMPSON et al.,
Executors, etc., impleaded, etc., Appellants.

(Argued March 3, 1882 ; decided June 13, 1882.)

THIS action was brought to settle the accounts of the firm of John T. Wilson & Co., which firm was composed of the plaintiff, Alexander Simpson, defendant's testator, and James W. Emery. Simpson died October 24, 1873. The following extract from the opinion presents the point prominently urged, and the views of the court thereon :

"The defendants' counsel insists that the referee was in error in holding that Wilson and Emery were not bound to account for any of the profits of the business conducted by them after the 31st of December, 1873. Alexander Simpson, the testator, died on the 24th day of October previous to the last-named date. Under ordinary circumstances the death of one of the partners terminates the copartnership." (3 Story on Part., § 343 ; 3 Kent Com. [1st ed.] 55.)

A community of interest still existed, however, between the survivors and the representatives of the deceased partner, and the latter has a right to insist upon the application of the joint property to the payment of the joint debts, and a distribution of the surplus. Until this is done the copartnership has a limited continuance. (3 Kent [1st ed.], 57.)

There was no provision in the articles of copartnership in conflict with the general rule of law which we have stated.

The first clause made provision that it should continue "for so long a time as they" (the partners) shall severally mutually agree thereto." The eleventh clause declared that in case of death it "shall not necessarily be dissolved, but the said partnership may be continued with the survivors jointly with the executrix of such deceased partner or the assignee." There is nothing compulsory in either of these clauses and no obligation was thereby imposed.

While it might be continued by the voluntary agreement of the parties no legal right existed which could be enforced in law or equity where either party indicated a desire that the affairs of the partnership should be closed up. If the business had been conducted by the survivors in the copartnership name, and profits were realized, it may well be that the partners acting would be bound to account for the same, and the representatives of the deceased partner would be entitled to a share thereof. Whether this was done and the plaintiff was liable to account upon any such basis is the first subject of inquiry upon this appeal.

There was evidence showing that at a very early period after the decease of Simpson the surviving members of the firm indicated their wishes that the partnership should not be continued, and their opposition to a continuance of the business with the executors. And on the 25th of November the plaintiff wrote a letter to Mrs. Simpson, to the effect that a dissolution of the co-partnership should take place in the immediate future. Upon the 26th of December, 1873, a letter was written at plaintiff's request, by Mr. Townsend to Mrs. Simpson, stating the terms upon which the plaintiff was willing to take the testator's interest in the business. Several checks were afterwards sent by the plaintiff to Mrs. Simpson, signed in the name of the old firm with the additional words "in liquidation," the money on which was received by Mrs. Simpson with objection, however, to this dissolution. There was also other evidence, including the testimony of the counsel of Mrs. Simpson, which showed that the business, which was conducted until the end of the year 1873, was required to

be closed, and after that time the survivors continued the same as a new firm, the existence of which was understood by all parties. In view of all the facts and without discussing the evidence at length, there appears to be sufficient to warrant the conclusion of the referee that the surviving members of the copartnership were not bound to account for the profits after the year 1873."

Various other questions are disposed of on the facts.

B. F. Blair for appellants.

Francis Lynde Stetson for respondent.

MILLER, J., reads for affirmance.

All concur, except FINCH and TRACY, JJ., dissenting; and RAPALLO, J., absent.

Judgment affirmed.

DELLA A. PALMER, Respondent, v. GEORGE B. DEARING,
Appellant.

(Argued June 1, 1882; decided June 13, 1882.)

Samuel Hand for appellant.

James Troy for respondent.

Agree to dismiss appeal, and to remand case to General Term for a rehearing.

All concur.

Ordered accordingly.

JOHN CURTIN, Plaintiff in Error, v. THE PEOPLE OF THE STATE
OF NEW YORK, Defendant in Error.

(Submitted June 2, 1882; decided June 13, 1882.)

Leon Abbett for plaintiff in error.

John McKeon for defendant in error.

Agree to affirm. No opinion.

All concur, except FINCH, J., absent.

Judgment affirmed.

HENRY GAWTHROP et al., Appellants, v. JAMES D. LEARY,
Respondent.

(Submitted June 2, 1882; decided June 13, 1882.)

The General Term reversed the judgment in this action upon the facts, holding that the evidence was insufficient to support the verdict, but did not order a new trial.

The court here say: "An examination of the record leads us to think that should have been done. (*Goodman v. Conklin*, 85 N. Y. 21.) It cannot be said that on a new trial a recovery would be impossible."

Albert A. Abbott for appellants.

John Berry for respondent.

Per Curiam opinion for modifying judgment by ordering a new trial.

All concur, except TRACY, J., absent.

Judgment accordingly.

THOMAS TEN EYCK, Appellant, v. JESSE RYDER, et al., Re-
spondents.

(Argued April 28, 1882; decided June 13, 1882.)

Thomas Nelson for appellant.

Samuel Watson for respondents.

TRACY, J., reads for affirmance.

All concur, except MILLER, J., not voting.

Judgment affirmed.

JOSHUA C. SANDERS, Respondent, v. JOHN TOWNSHEND, Appellant.

| | |
|-----|-----|
| 89 | 623 |
| 180 | 614 |
| 89 | 623 |
| 161 | 289 |

(Argued June 2, 1882; decided June 13, 1882.)

This was an action of ejectment brought to recover two lots of land, situate, as described in the complaint, on the southerly side of Eighty-ninth street, in the city of New York, and known and distinguished by the numbers fifty-nine and sixty on a map of the Harlem commons, made by Charles Clinton, surveyor, and on file in the office of the register of the city and county of New York.

Upon the trial the plaintiff put in evidence a deed of the lots executed to him on the 4th day of January, 1873, by Gordon Burnham, and he also proved that he took formal possession of the lots on the 1st day of December 1873, and inclosed them with a substantial fence, and that he thereafter continued in possession of them until he was ousted by the defendant. He gave no proof that his grantor Burnham had title to the lots or that he had ever been in actual possession of them. The plaintiff testified that the lots were a part of the Harlem commons known by the numbers 59 and 60 on a map thereof made by Clinton, which was on file in the register's office, and that the lots formerly belonged to Dudley Selden fifty-five years before the trial. After the plaintiff had introduced his evidence and rested, he admitted, upon the request of the defendant, that the title to the Harlem commons containing about two hundred and ninety acres, of which the two lots in question are a part, was in 1825 vested in Dudley Selden. The defendant then put in evidence a deed executed by Selden and wife to Isaac Adriance, dated April 23, 1832, and recorded in the register's office February 8, 1833. That deed conveyed by numbers upward of five hundred lots situated in Harlem commons, in the twelfth ward of the city of New York. The deed commences with a recital that Selden had theretofore from time to time bargained, sold, conveyed and mortgaged parts of the lands known as Harlem commons, and that the title to certain other parts of the commons "still remain unconveyed, a description whereof is hereinafter set forth as appears by the lot-book, as

the same has been examined by the parties of the first and second parts." The deed then grants "All the following lots, pieces or parcels of land lying or being in the twelfth ward of the city of New York, known and distinguished as part of the Harlem commons and which said lots hereby conveyed are laid down on a map of said commons made by Charles Clinton, of the city of New York, surveyor, as lots numbered and bounded as follows, to wit": Then a large number of lots are inserted, but numbers 59 and 60 are not among them. Then follow these clauses: "Also all other lands contained within the limits of said commons as described on said map of said Charles Clinton not heretofore conveyed by the parties of the first part." "Also all other lands not heretofore conveyed by the parties being a part of said commons which are described on a map of said commons made by Joseph F. Bridges, city surveyor of said commons." The defendant then introduced in evidence a certified copy of the will of Isaac Adriance, dated in 1854 in which he devised all his real estate to his wife. He then proved a deed to himself from Mrs. Adriance dated November 6, 1873, of the two lots in question. It was also proved by Burnham that the latter bought the two lots at a corporation tax sale in 1849, and at various tax sales thereafter, that he took leases from the corporation upon such sales, that from 1849 down to the time of his conveyance to the plaintiff, no one ever disputed his claim to the lots, and that he knew of no one who had a right to dispute it. The defendant testified that he examined the records in the register's office in the city of New York for a conveyance by Dudley Selden of these two lots prior to his deed to Adriance, and that he did not find any such conveyance, although he found conveyances by him of over two thousand lots situated in the commons. Upon the facts thus substantially stated, the trial court directed a verdict for the defendant.

The court here say: "We think that direction was right. The plaintiff, having shown no right or title except that to be inferred from his actual possession, must fail in this action if the defendant has established a paper title derived from Selden, and whether he had such title or not depends upon the force and effect to be given to the conveyance from Selden to Adri-

ance. The claim of the plaintiff is that that deed does not sufficiently describe the two lots in question to convey them, and that claim, we are of opinion, is not well founded. It is conceded that these lots were known on the Olinton map and on the Bridges map as lots fifty-nine and sixty, and they are so described in the deed from Burnham to the plaintiff, and substantially so described in the complaint. It is recited in the deed from Selden that he had from time to time sold and conveyed portions of the Harlem Commons and that he still retained title to certain other parts of the commons which remained unconveyed as appeared by the lot-book as the same had been examined by the parties to that conveyance, a description whereof was set forth particularly in the deed. By that particular clause in the deed we understand that the parties intended to give particular description in the deed of the lots which appeared by the lot-book not to have been conveyed and that the lots which so appeared not to have been conveyed are particularly inserted and described by their lot numbers in the deed. The inference is that these lots fifty-nine and sixty, which are not by their lot numbers inserted or described in the deed, were believed to appear upon the lot-book to have been before conveyed, and that was the reason why they were not particularly designated. Then after giving a particular description of all the lots thus found unconveyed upon the lot-book, to make sure that there should be no mistake that the conveyance covered all the lots still owned by Selden in Harlem Commons whether they appeared upon the lot-book to have been conveyed or not, the further clauses above set out were inserted in the deed. The Commons were divided into about three thousand five hundred lots, and the parties may well have had apprehension that in dealings with so many lots there might have been mistakes in entries made in the lot-book or in some other way. It is undisputed that these two lots were upon the maps made by Olinton and Bridges, and they are therefore covered by these clauses in the deed.

Hence it is very clear that the language of this deed is broad enough to cover these two lots if they had not before been conveyed. The conveyance of them was therefore good as against

the grantor; that is, after the execution of this deed he could not claim title to the lots against Adriance. The defendant having thus shown a paper title good on its face against the grantor, the conceded owner, it is good as against the whole world except some person who could show an earlier conveyance from the grantor, and the plaintiff has not connected himself with any title whatever derived from the grantor. Indeed the evidence tends strongly to show, and being undisputed was sufficient *prima facie* to show that the grantor had not parted with the title of these lots prior to his conveyance to Adriance. Such a title if conveyed, after the lapse of more than fifty years, would almost certainly, in the city of New York, find its way upon the records of conveyances, and a search of those records showed no such conveyance. Besides, during more than thirty years that Burnham claimed to own these lots, he heard of no claim of title to them by any one claiming an earlier conveyance from Selden, and it is fair to presume that none of the parties to this action have ever heard of or been able to trace such a conveyance.

Taking all these facts and the language of the deed, we think the court was justified in holding that the title was in the defendant, and in directing a verdict for him."

The order of the General Term should therefore be reversed, and the judgment of the Special Term affirmed with costs.

Theron G. Strong for appellant.

J. C. Sanders for respondent.

EARL, J., reads for reversal and new trial.

All concur, except FINCH, J., absent.

Order reversed and judgment affirmed.

CHARLES CLEVELAND, Respondent, v. THE NEW JERSEY STEAM-
BOAT COMPANY, Appellant.

(Argued May 2, 1882; decided June 20, 1882.)

THIS action was brought to recover damages for injuries alleged to have been sustained through defendant's negligence. It is reported on a former appeal in 68 N. Y. 306.

Plaintiff, who had taken passage on one of defendant's steamboats from New York to Albany, when standing near the gangway opening, a rush of passengers to see a man who had fallen overboard occurred, and he was shoved overboard and injured. A gate was provided for this gangway, which was ordinarily put in its place after the boat left the wharf. The top bar of the gate projected at each end, and these projecting ends, when the gate was in place, rested in two iron staples; and there were two upright stanchions, outside of the gate, let into the deck. There was also a top rail which received these stanchions, and was secured in its place by iron slides. The negligence, complained of on the former trial, was the omission of defendant to have the top rail in place at the time of the accident. It appeared that the gate was put in place, and was lifted out by some one while the mate had turned to get the top rail. On the second trial plaintiff sought to show that the gate itself had not been put in place, and this question was submitted to the jury, to which defendant excepted. The court here, after a review of the evidence, held that the fact that the gate was put in its place was established by uncontradicted evidence, and that the submission of the question to the jury was error.

W. P. Prentice for appellant.

Francis Kernan for respondent.

TRACY, J., reads for a reversal and new trial.

All concur.

Judgment reversed.

JOHN T. HARROLD, Respondent, *v.* THE NEW YORK ELEVATED
RAILROAD COMPANY, Appellant.

(Argued June 5, 1882 ; decided June 20, 1882.)

John H. Bergen & David Dudley Field for appellant.

Chauncey Shaffer for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and FINCH, JJ., absent.

Judgment affirmed.

BRIDGET LEONARD, Respondent, *v.* THE CITY OF WATERTOWN,
Appellant.

(Argued June 5, 1882 ; decided June 20, 1882.)

John W. Hogan for appellant.

Thomas F. Kearns for respondent.

Agree to affirm. No opinion.

All concur, except MILLER and FINCH, JJ., absent.

Judgment affirmed.

REUBEN T. POLLARD et al., Respondent, *v.* WILLIAM BRADY,
Appellant.

(Argued June 5, 1882 ; decided June 20, 1882.)

Harry Wilber for appellant.

Frederick H. Man for respondent.

Agree to affirm on opinion below.

All concur, except MILLER and FINCH, JJ., absent.

Order affirmed.

JUSTINE PEARLSTROM, Respondent, v. JAMES GORDON BENNETT,
Appellant.

(Argued June 8, 1882 ; decided June 20, 1882.)

Theron G. Strong for appellant.

Edward Van Ness for respondent.

Agree to affirm. No opinion.

All concur, except TRACY, J., who dissents.

Judgment affirmed.

ANNA D. ANTHONY, Appellant, v. HENRY DAY et al., Re-
spondents.

(Argued June 9, 1882 ; decided June 20, 1882.)

DECIDED on the facts.

Cephas Brainerd for appellant.

F. B. Lord for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

THE NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW
YORK, Respondent, v. MARTIN HERZ, Impleaded, etc., Ap-
pellant.

| |
|----------|
| 89 c 629 |
| 159 211 |
| 89 c 629 |
| 162 120 |

(Submitted June 9, 1882 ; decided June 20, 1882.)

THIS action was brought against defendant as alleged part-
ners composing the firm of Martin Herz & Co., to recover the
amount of four promissory notes indorsed in the name of that
firm.

The opinion, which is given in full, states the material facts.

“Prior to the 15th day of September, 1875, the appellant and one Rosenberg composed the firm of Martin Herz & Co., and in that name carried on business in the city of New York. In its transaction they opened an account with the plaintiff, and in the course of it obtained discounts, made deposits, and drew checks, as is usual when the relation of banker and customer exists. On that day they dissolved partnership, but the business was continued in the same place by Rosenberg on his own account, but by consent of Herz, in the name of Martin Herz & Co. Notice of this dissolution was given through the newspapers, and ‘mailed to persons who had been dealers with’ the firm, and, among others, to the plaintiff. It was not received by it, however, and the referee finds they had no knowledge of the dissolution of the firm at the time they discounted the notes, which constitute the cause of action in this case.

“These notes were indorsed by Rosenberg in the firm name, and so discounted by the plaintiff at his request, but, as they supposed, for the benefit of the firm. Upon the question of notice there was evidence which, standing alone, would justify a finding favorable to the defendant. That of Rosenberg is to the point, but he is contradicted by the officers of the bank, to whom, as he says, notice was given, and there is other testimony from both sides. It was therefore conflicting, and the issue resting upon it is not for us to determine. (*Stevens v. The Mayor*, 84 N. Y. 297.) In the face of this finding the defense must fail. The plaintiff took the notes upon the credit of the indorsement, and because through earlier transactions, to which the appellant was a party, a confidence had been created in the character and solvency of the firm upon which they had a right to rely until notified of its dissolution. As to the plaintiff, therefore, the appellant must be deemed to have continued in the firm, and may be treated as a party to the contract of indorsement. The discount was in the usual course of business, and by the circumstances above adverted to is brought within the principle which permits one partner to bind his copartner in dealing under the firm name with one who had no knowledge of the dissolution of the firm.”

“In *Ketcham and Black v. Clark* (6 J. R. 44), decided in 1810,

this rule is declared to have been frequently and solemnly laid down as part of the mercantile law of England, and its sanction by the courts of this State demanded by reasons of necessity and justice. It has since been so frequently applied. (*National Bk. v. Norton*, 1 Hill, 572; *Davis v. Allen*, 3 Comst. 168; *Austin v. Holland*, 69 N. Y. 571; 25 Am. Rep. 246), that it would be misspending time to reiterate the arguments on which it rests. It was properly applied by the referee. We find nothing in the case which made the proceedings in bankruptcy in the matter of Rosenberg relevant to any inquiry before the court. It follows that no error was committed by the referee, and that the judgment appealed from should be affirmed."

J. P. Solomon for appellant.

George C. Lay, Jr., for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

IN THE MATTER OF THE PETITION OF MARTHA C. KUHNE,
Respondent, *v.* HENRY DAILY, Jr., Appellant.

(Submitted June 13, 1882; decided June 20, 1882.)

Henry Daily, Jr., appellant in person.

A. H. Daily for respondent.

Agree to dismiss appeal. No opinion.

All concur except TRACY, J., who does not vote.

Appeal dismissed.

HOWARD W. COATES et al., Executors, etc., Respondents, *v.*
BENJAMIN P. FAIRCHILD et al.

LEOPOLD FRIEDMAN, Purchaser, etc., Appellant.

(Argued June 13, 1882; decided June 20, 1882.)

John M. Bowers for appellant.

Frederic W. Hinricks for respondents.

Agree to affirm on opinion below. All concur.
Order affirmed.

PATRICK McKENNA, Respondent, v. HELENA M. EDMONDSTONE
et al., Appellants.

(Argued June 13, 1882 ; decided June 20, 1882.)

Martin J. Early for appellants.

Abner C. Thomas for respondent.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

In the matter of the GERMAN SAVINGS BANK, in the city of
New York, v. JAMES H. CARRINGTON, et al.

(Argued June 13, 1882 ; decided June 20, 1882.)

James P. Lowery for appellant.

N. B. Howie for respondent.

Agree to affirm. No opinion.
All concur.
Order affirmed.

CATHARINE LACHENMEYER, Respondent, v. AUGUST LACHEN-
MEYER, Appellant.

(Argued June 13, 1882 ; decided June 20, 1882.)

George F. Langbein for appellant.

Albert Day for respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

JAMES H. VAN GELDER, Appellant, v. PRENTISS W. HALLEN-
BECK, late Sheriff, Respondent.

(Argued June 13, 1882 ; decided June 20, 1882.)

Samuel Hand for appellant.

James B. Olney for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

WILLIAM H. POPHAM, Respondent, v. THE TWENTY-THIRD
STREET RAILWAY COMPANY, et al., Appellants.

(Argued June 13, 1882 ; decided June 20, 1882.)

Osborn E. Bright for appellants.

D. M. Porter for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed

MARTIN V. B. SMITH, Respondent, v. JOHN MAHON et al.,
Appellants.

(Argued June 13, 1882 ; decided June 20, 1882.)

John E. Eustis for appellants.

James Armstrong for respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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THOMAS MCINTYRE, Respondent, v. PHILIP SANFORD et al.,
Appellants.

The provision of the Code of Civil Procedure (§ 1440, as amended by § 2, chap. 681, Laws of 1881), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee.

(Argued May 31, 1882 ; decided June 30, 1882.)

THIS action was brought to set aside a sheriff's sale of bonds under an execution on the ground of fraud, irregularity and abuse of process by the sheriff in making the sale.

The allegations of fraudulent collusion between the purchaser and the sheriff, and of abuse of process on the part of the latter were sustained by the findings of the court. The prominent questions argued upon this appeal were as to the sufficiency of the evidence to sustain the finding. It was held sufficient by the court.

The appellant's counsel also claimed that the judgment could only be affirmed upon the conditions specified in section 1440 of the Code of Civil Procedure, as amended by section 2, chapter 681, Laws of 1881. *Held* as above.

The court, however, held that as the judgment against plaintiff had been paid and satisfied, and as this was an equitable action, plaintiff should refund to the purchaser the amount of the judgment with interest, and that the judgment should be so modified.

William A. Abbott for appellants.

Chauncey S. Truax for respondent.

MILLER, J., reads for modification of judgment, and for affirmation as modified.

All concur, except TRACY, J., absent.

Judgment affirmed.

CHARLES D. DOUBLEDAY, Appellant, *v.* PARLEY A. DAILEY
et al., Respondents.

(Argued June 9, 1882 ; decided June 30, 1882.)

Henry E. Tremain for appellant.

Samuel D. Morris for respondents.

Agree to dismiss appeal. No opinion.
All concur, except TRACY, J., absent.
Appeal dismissed.

THE PEOPLE, ex rel. JOHN SWINBURNE, Appellant, *v.* THE
TRUSTEES OF THE ALBANY MEDICAL COLLEGE, Respondent.

(Argued June 13, 1882 ; decided June 30, 1882.)

Nathaniel C. Moak for appellant.

Amasa J. Parker for respondent.

Agree to affirm. No opinion.
All concur.
Order affirmed.

ALFRED WHITMAN et al., Respondents, *v.* JOHN D. JAMES
et al., Appellants.

(Argued June 13, 1882 ; decided June 30, 1882.)

Charles Edward Souther for appellants.

William H. Sage for respondents.

Agree to affirm. No opinion.
All concur.
Order affirmed.

ELIAS S. HIGGINS et al., as Executors, etc., Respondents, v.
G. AUGUSTUS HEALY et al., Appellants

(Argued June 15, 1882 ; decided June 30, 1882.)

Edward P. Wilder for appellants.

Aaron Pennington Whitehead for respondents.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

JENNIE W. HALL, Respondent, v. EATON J. RICHARDSON, Appellant.

(Argued June 19, 1882 ; decided June 30, 1882.)

George W. Adams for appellant.

John D. Kernan for respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

THE POUGHKEEPSIE, HARTFORD AND BOSTON RAILROAD COMPANY, Appellant, v. AMBROSE N. SIMPSON et al., Respondents.

(Argued June 19, 1882 ; decided June 30, 1882.)

Homer A. Nelson for appellant.

R. E. Andrews for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

AARON BARNETT, Respondent, v. PAULINE ZACHARIAS, Appellant.

(Argued June 20, 1882 ; decided June 30, 1882.)

James C. de La Mare for appellant.

A. R. Dyatt for respondent.

Agree to affirm order and for judgment absolute against appellant.

All concur.

Order affirmed and judgment accordingly.

In the Matter of the Petition of the LOOKPORT AND BUFFALO RAILROAD COMPANY for authority to use highway in the town of Wheatfield, Niagara County.

(Argued June 20, 1882 ; decided June 30, 1882.)

D. H. McMillan for appellant.

George W. Bowen for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

CHARLES F. WADSWORTH et al., Respondents, v. THOMAS L. HARISON, Appellant.

(Argued June 21, 1882 ; decided June 30, 1882.)

E. M. Holbrook for appellant.

James B. Adams, Jr., for respondents.

Agree to affirm. No opinion.

All concur, except TRACY, J., absent.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN
P. TWEED, Appellant.

(Argued June 22, 1882 ; decided June 30, 1882.)

Wm. F. Kintzing for appellant.

John Vincent for respondent.

Agree to affirm. No opinion.

All concur, except TRACY, J., absent.

Judgment affirmed.

EDWIN F. BOWEN, Appellant, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued June 22, 1882 ; decided June 30, 1882.)

Oliver W. West for appellant.

D. J. Dean for respondent.

Agree to affirm. No opinion.

All concur, except TRACY, J., absent.

Judgment affirmed.

THERON S. ATWATER, Appellant, v. ANDREW DIRACCI, Jr., et
al., Respondents.

(Argued June 26, 1882 ; decided June 30, 1882.)

Wm. W. Goodrich for appellant.

Edward H. Hobbs for respondents.

Agree to affirm. No opinion.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

JAMES N. PAULDING, Individually, and as Trustee, etc., et al.,
Respondents, *v.* ALEXANDER T. ARTHUR, Appellant.

(Argued June 22, 1882 ; decided June 30, 1882.)

Joseph M. Pray for appellant.

N. B. Sanborn for respondents.

Agree to affirm. No opinion.

All concur, except TRACY, J., absent.

Judgment affirmed.

FRANK P. SHEAN, Appellant, *v.* HEMANS P. MATTHEWS,
Respondent.

(Argued June 27, 1882 ; decided June 30, 1882.)

W. H. Sawyer for appellant.

Leslie W. Russell for respondent.

Agree to dismiss appeal. No opinion.

All concur, except TRACY, J., absent.

Appeal dismissed.

THE ARCHITECTURAL IRON WORKS, Appellant, *v.* THE CITY OF
BROOKLYN, Respondent.

(Argued November 28, 1881 ; decided June 30, 1882.)

Joshua M. Van Cott for appellant.

Wm. C. De Witt for respondent.

Agree to affirm order and for judgment absolute against
appellant on stipulation. No opinion.

All concur.

Order affirmed, and judgment accordingly.

THE CITY OF BROOKLYN, Appellant, v. FREDERICK J. NODINE,
Respondent.

(Argued June 20, 1882; decided June 30, 1882.)

William G. Cooke for motion.

John A. Taylor opposed.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

THE PEOPLE'S BANK OF THE CITY OF NEW YORK, Appellant,
v. THE MECHANICS' NATIONAL BANK OF NEWARK, NEW
JERSEY, Respondent.

(Submitted June 27, 1882; decided June 30, 1882.)

THIS was a motion to remit the return to the court below for amendment. It was denied for reasons stated in opinion in *National Shoe and Leather Bank v. The Mechanics' National Bank* (ante, 440).

Gray & Davenport for motion.

Aaron Pennington Whitehead opposed.

DANFORTH, J., reads mem. for denial of motion.

All concur.

Motion denied.

In the Matter of the Application of MENDEL FRIEDMAN, Re
spondent, v. S. ALBERT MINCHS, Appellant.

In the Matter of the Application of NATHAN WALD, Appellant,
v. SAME, Respondent.

(Submitted June 27, 1882; decided June 30, 1882.)

J. H. Goodman for motion.

Agree to deny motion to dismiss appeal. No opinion.

All concur.

Motion denied.

CHARLES R. WESTBROOK, Appellant, v. WILLIAM GLEASON, Impleaded, etc., Respondent.

Where one in the possession of lands under a contract for the purchase thereof, and who has made payments upon the contract and has made improvements upon the premises, takes a deed thereof without knowledge of the existence of a prior unrecorded mortgage thereon, giving a bond and mortgage for the whole purchase-price, and in consideration of the conveyance surrenders his rights as vendee in possession, and the deed and subsequent mortgage are recorded before the prior mortgage, he is a *bona fide* purchaser for value within the meaning of the recording act (1 R. S. 756, § 1). The title so acquired is superior to such prior mortgage, and a purchaser upon foreclosure of the subsequent mortgage takes the premises freed from the lien of the prior mortgage.

(Argued April 21, 1882 ; decided October 10, 1882.)

THIS action was brought to foreclose a mortgage on two hundred and seventy-five acres of land executed by Dennis D. McKoon to Marcus Schoonmaker, and by him assigned to the plaintiff. Defendant Gleason claimed a title to fifty-five acres of the land superior to the mortgage. The case is reported on a former appeal in 79 N. Y. 23.

The questions here presented appear in the following extract from the opinion.

“ When this case was before us on the former appeal, we held that if Samuel Jones was a purchaser from McKoon of the fifty-five acres in question in good faith and for a valuable consideration, without notice of the unrecorded mortgage from McKoon to Schoonmaker (being the mortgage under which the plaintiff claims), he (Jones) took title free from that mortgage, his deed having been first recorded; and that the respondent Gleason, having acquired the title of Jones, the Schoonmaker mortgage could not be enforced against the fifty-five acres in the hands of Gleason or his grantees.

“ Upon the evidence on the first trial we held that the finding that Jones took his deed from McKoon in good faith and without notice of the Schoonmaker mortgage was sufficiently supported, and that the evidence would have justified a further finding that he gave a valuable consideration for the deed. That it appeared that at the time he took the deed he had an

equitable title to the land by virtue of a contract for the purchase thereof, under which contract he had been in possession of the land for several years, and had made improvements thereon, and that if in consideration of the deed he surrendered his title as vendee in possession, with his right to his improvements, etc., he was a purchaser for value. The ground upon which, on the first trial, it was found that he was not a purchaser for value was that he paid the whole purchase-money by giving his own bond and mortgage therefor; but it needs no argument to prove that if, in consideration of the deed, he surrendered his rights under his contract, and gave a larger price than he was bound to pay under his contract, and secured the purchase-money by a mortgage covering the improvements which were equitably his own, this was a parting with value, which would constitute a sufficient consideration to bring him within the protection of the statute.

“On the second trial, which is now under review, the trial court found that Jones purchased the fifty-five acres in question from McKoon, and took his deed therefor in good faith and without any knowledge of the existence of the plaintiff's mortgage, and believing that he was getting an unincumbered title; that at the time of the agreement for said purchase, Jones and his wife were, and had been for several years, in possession of the land under a contract for the purchase thereof, and had made valuable improvements thereon by clearing the land, planting an orchard and putting up buildings, and had paid part of the purchase-money, and at all times claimed to own the land, and that as part of the agreement with McKoon for said purchase, Jones waived and gave up his right and equitable interest in said fifty-five acres and agreed to take a deed thereof from McKoon and pay him therefor \$500, McKoon claiming to be the owner of the land, and that in pursuance of such agreement McKoon and his wife executed and delivered to Jones a deed of the premises dated the 1st of October, 1868, and Jones at the same time delivered to McKoon a bond and mortgage on the land, to secure said \$500, together with \$200 advanced by McKoon to Jones to buy a yoke of oxen, making the \$700 for which the mortgage was given, and that at the time Jones took the deed he had an equit-

able interest in, and right and title to said fifty-five acres, which he surrendered and gave up when he took said deed and gave said mortgage.

"The facts thus found clearly sustain the conclusion of the trial court that Jones was a *bona fide* purchaser within the provisions of the statute, and entitled to be protected against the unrecorded mortgage. But the appellant now contends that some of the material findings are unsupported by any evidence, and that his exceptions thereto should be sustained.

"These exceptions compel us to look into the evidence sufficiently far to ascertain whether there is any evidence to sustain the conclusions of the trial judge."

The residue of the opinion is taken up with a discussion of the evidence, and the conclusion is arrived at that there was sufficient to sustain the findings.

M. Schoonmaker for appellant.

William Gleason for respondent.

RAPALLO, J., reads for affirmance.

All concur, except MILLER and TRACY, JJ., absent.

Judgment affirmed.

JOHN S. LEESE, Respondent, *v.* HENRY HEINS, Appellant.

(Argued May 29, 1882; decided October 10, 1882.)

THIS action was brought to recover damages for breach of warranty of title on sale of a horse. The plaintiff dealt wholly with a third person. The case was decided here upon the ground that there was no evidence that such third person was authorized by defendant to sell the horse in question, or that defendant ever ratified the sale or had any portion of the proceeds, and therefore that a motion for nonsuit should have been granted.

F. L. Backus for appellant.

H. C. Place for respondent.

Per Curiam opinion for reversal and new trial.
All concur, except TRACY, J., absent.
Judgment reversed.

THERESE SCHULTZ, Respondent, v. THEODOR SCHULTZ, Appellant.

(Argued May 30, 1882; decided October 10, 1882.)

Schultz v. Schultz (27 Hun, 26), reversed.

THIS was an appeal from an order of General Term affirming an order of Special Term, which denied a motion to vacate an order of arrest herein.

The action was by a wife against her husband to recover damages for assault and battery.

Benno Loewy for appellant.

L. Ansbacher for respondent.

Agree to reverse order and to dismiss complaint. No opinion.
All concur, except DANFORTH, J., who reads for affirmance, and FINCH, J., who concurs therein.

Ordered accordingly.

JOHN THORNTON et al., Appellants, v. ROBERT CROWLEY, Respondent.

(Argued June 5, 1882; decided October 10, 1882.)

Douglas Campbell for appellants.

Charles W. Sloane for respondent.

Agree to affirm. No opinion.

All concur, except MILLER, J., absent.
Judgment affirmed.

INDEX.

ACCOUNTING.

1. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity, although no express trust be created by the will. *Wager v. Wager.* 161

2. Any person claiming an interest in the personalty, either as legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. *Id.*

3. *It seems* that, where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. *Id.*

— *By executors, with what chargeable.*
See Lent v. Howard. 169

— *Where estate of deceased partner not entitled to be allowed on accounting, a share of profits of business after the decease.*
See Wilson v. Simpson. (Mem.) 619

ACTION.

The attorney-general, in an action brought by him, represents the

whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. *People v. Brooklyn F & O. I. R. Co.* 75

AMENDMENT.

1. The provision of the Code of Civil Procedure in regard to amendments (§ 723) does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants. *N. Y. S. M. M. P. Assn. v. R. A. Works.* 22
2. *It seems* that upon motion made to vacate a judgment because of informality of the proof of service of the summons, the informality may be cured by amendment. *Maples v. Mackey.* 146

APPEAL.

1. A writ of prohibition is not demandable as matter of right, but of sound judicial discretion. *People, ex rel. Adams, v. Westbrook.* 152
2. An order of the General Term of the Supreme Court, therefore, denying the writ is not reviewable here. *Id.*
3. Plaintiff's claims herein amounted to \$406. Defendant set up a counter-claim of \$300, to which plaintiff interposed a reply. On the trial, which was before a referee, but little evidence was given in support of the counter-claim, and no request was made for a finding in its support. The report and the

judgment were for just the amount of plaintiff's claims. *Held*, that this was the matter in controversy, and as the amount was less than \$500, an appeal to this court could not be taken. *St. Clair v. Day*. 357

4. An order vacating an attachment issued before judgment is not reviewable here. *Nat. S. & L. Bk. v. Mech. Nat. Bk.* 440

5. On appeal to this court brought to review the decision of commissioners appointed to change the proposed route of a railroad, only questions of law can be considered and determined, and all that can be done by the General Term of the Supreme Court, or by this court, is to send the report back where errors of law have been committed. *In re L. S. & M. S. R. R. Co.* 442

— *Party not aggrieved by order cannot appeal therefrom.*
See Hall v. Brooks. 33

— *Power of General Term on appeal under chapter 444, Laws of 1876, from decision of Board of Audit.*
See Danolds v. People. 36

— *Constitutional question only to be determined by Court of Appeals when directly and necessarily involved in the issue.*
See People v. B. F. & C. I. R. R. R. 75

— *Where, although question to witness is too broad, the answer is confined to precise issue, there is no error.*
See Wright v. Cabot. 570.

— *When question as to jurisdiction of County Court is one of fact and so not reviewable here.*
See Coe v. Raymond. (Mem.) 612

— *Upon reversal of judgment by General Term on ground of insufficiency of evidence, new trial should be ordered, unless a recovery on such trial would be impossible.*
See Gawthrop v. Leary. (Mem.) 622

ASSESSMENT AND TAXATION.

1. The omission to file a map in accordance with the provision of the

act of 1870 (§ 2, chap. 626, Laws of 1870), requiring the department of public parks in the city of New York to cause to be made maps and plans of the streets laid out, altered, etc., is not a substantial or vital error rendering an assessment for a change of grade of an existing and established street invalid; the filing of the map is not an indispensable prerequisite to the establishment of a new grade, but simply a matter of form, a mere irregularity which furnishes no ground for vacating or setting aside the assessment. *In re Upson.* 67

2. In 1859 a contract was awarded to one McG. to regulate and grade a certain portion of Fifth avenue. It provided that, in case the grade should be changed during the progress of the work, the contractor was to conform to the altered grade at the contract-prices, so far as applicable; this contract was not completed until in 1875, several months previous to which time a new contract was made with E. to regulate and grade, in accordance with a new grade, under an ordinance of the common council, passed in 1874. If the work had been done under the contract of McG. the expense would have been much less. *Held*, that, as it did not appear that there was any such difference or change made as rendered the first contract inapplicable, or that it could not have been enforced, the parties assessed were entitled to the benefit of the reduced prices; that the error, however, furnished no ground for vacating the assessment entirely, but simply for a reduction. *Id.*

3. Where the verification of an assessment-roll in the city of Brooklyn was by affidavit containing the statements "provided by law in regard to assessments in the different towns of this State," but omitted the statement required by the charter of said city (§ 31, tit. 4, chap. 384, Laws of 1854, as amended by § 21, chap. 63, Laws of 1862), to the effect that the assessors "have together personally examined, within

- the year past, each and every lot and parcel of land, house, building or other assessable property within the ward," *held*, that the omission was a substantial defect which invalidated the tax and a sale made because of non-payment thereof; and that plaintiff, who had purchased at the sale, under an agreement with the city that in case of any irregularity in the proceedings prior to the sale, the purchase-money should be refunded, could, after demand and refusal, recover back the moneys paid. *Brevoort v City of Brooklyn*. 128
4. A lot was bid off by the registrar of arrears for the city, and a certificate of the sale issued which the registrar sold and assigned to plaintiff under a similar agreement. *Held*, that the registrar had authority to bid in the land, sell the certificate and warrant the validity thereof. *Id.*
 5. The act of 1868 (Chap. 631, Laws of 1868), widening Sackett street in the city of Brooklyn, provided for a municipal, not a State improvement, and imposed upon the city the ultimate duty of paying the land-owners for the lands taken. (RAPALLO and EARL, JJ., dissenting.) *Sage v. City of B'klyn.* 189
 6. Where, therefore, lands of plaintiffs were taken for said improvement and an award made to them therefor by the commissioners of estimate and assessment, but the comptroller refused to pay the award, as the assessment made for the improvement was only collected in part, and the amount collected was paid out in payment of claims presented before the presentation of plaintiffs', *held*, that an action was maintainable against the city to recover the sum awarded. (RAPALLO and EARL, JJ., dissenting.) *Id.*
 7. Also *held*, that the exemption clause in the act of 1862 (§ 89, chap. 63, Laws of 1862) was not applicable. (RAPALLO and EARL, JJ., dissenting.) *Id.*
 8. The provisions of the act entitled "An act in relation to regulating and grading the Eighth avenue in the city of New York" (Chap. 593, Laws of 1870), which authorize the commissioners of public parks to change the grade of streets intersecting said avenue to conform to the grade thereof, are void, as the including them in the act renders it repugnant to the constitutional provision (State Const., art. 3, § 16) declaring that a local or private bill shall embrace but one subject, and that shall be expressed in the title. *In re Blodgett.* 392
 9. Accordingly *held*, that an assessment for grading an intersecting street, which work was done under said provisions, was void. *Id.*
 10. The provision of the act of 1880 providing "for raising taxes for the use of the State upon certain corporations," etc. (§ 3, chap. 542, Laws of 1880), which excepts from the operation of the act "manufacturing corporations carrying on manufacture within this State," is not limited to corporations organized under the General Manufacturing Act, but includes all corporations, under whatever law incorporated, whose chief and principal business is the manufacture and sale of artificial products. *N. G. L. Co. v. City of B'klyn.* 409
 11. A corporation organized under the act authorizing the formation of gas-light companies (Chap. 37, Laws of 1848), and which is engaged in manufacturing and supplying illuminating gas, is a manufacturing corporation within the meaning of said provision. *Id.*
 12. Accordingly *held*, that the provision of said act (§ 8), which exempts from other taxation all corporations liable to be taxed under the act did not apply to a gas-light company. *Id.*
 13. Under the provision of the act of 1871 (§ 4, chap. 226, Laws of 1871), authorizing the commissioner of public parks of the city of New York "to fix and establish the grades of the streets" within a

specified territory "where the same have not heretofore been fixed and established by law," not only were such grades excepted as had been fixed by legislative enactment, but also those lawfully established by ordinance of the common council. *In re Mut. L. Ins. Co.* 530

14. The provision does not authorize a change of grade, but deals only with streets whose grades have not been lawfully established. *Id.*

15. Where, however, it appeared, upon application to vacate an assessment, that the commissioner changed slightly the grade of a small section of a street, and that more than the increased cost of the improvement occasioned by the change was charged upon the city, because in excess of one-half the valuation of the property benefited, so that if the extra cost of the illegal work had been, in the first instance, left out of the assessment, or should be deducted therefrom, the cost of work lawfully done would exceed the amount of the assessment. *Held*, that there was no substantial error, and that an order vacating the assessment was error. *Id.*

16. The sidewalks of the street were laid but four feet wide. The ordinance, in general terms, directed that the sidewalks be flagged, without specifying the width. It was passed a short time prior to the passage of the city charter of 1873 (Chap. 835 of the Laws of 1873), which repealed the provision of the charter of 1870 (§ 1, chap. 383, Laws of 1870) requiring all flagging to be laid "full width," *i. e.*, twelve feet. It did not appear, however, that the contract for the work was made before such repeal. *Held*, that the objection was untenable; that the burden was upon the petitioner to show substantial error, and this he failed to do, as it was entirely possible that the work was in violation of no existing statute applicable to it when done. *Id.*

17. The scheme of sewer improvements in the city of New York con-

templates that the whole expense should be borne by the property benefited. *In re Lowden.* 548

18. Engineers' and surveyors' fees are properly included in an assessment for such an improvement, as an item of the expenses, and although the mode of ascertaining may not give the exact cost of this item, if it approximates thereto and the charge does not appear to be in excess of the sum properly chargeable to the work, it is not a tenable objection to the assessment. *Id.*

19. Nor is it a valid objection that the engineers by whom the work was done were already in the employ of the city, under a salary which had been paid. *Id.*

20. Where, therefore, an assessment for such a work included an item for engineers' and surveyors' fees, which was made under the supervision of the chief engineer of the bureau of sewers, and was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to the sewerage of the city done during the year, as would remunerate the city for the moneys paid for engineers' expenses, *held*, that in the absence of evidence that the share imposed upon the petitioner was enhanced, or that this item of expense could be arrived at in a way better or more just to him and the public, it was properly included. *Id.*

21. The statutes in relation to assessments for such improvements provide for sufficient notice and hearing to persons affected by an assessment to meet the constitutional requirements. *Id.*

22. Where the published notice required objections to an assessment to be presented to the "board of assessors," instead of to the chairman of that board as prescribed in the act of 1841 (§ 1, chap. 171, Laws of 1841), *held*, that the variance was immaterial, as the objections, if any were made, were for

the board, not for its chairman alone, to consider. *Id.*

ASSIGNMENT.

— *Where equities existing as between mortgagor and mortgagee cannot be availed of by former in action to foreclose brought by assignee of mortgage.*

See Riggs v. Purcell. (Mem.) 608

ASSIGNMENT (EQUITABLE).

1. An agreement, either oral or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment. *Williams v. Ingersoll.* 508

2. A valuable consideration is an essential and necessary element of an equitable assignment, and to make an order or direction to pay effectual as an assignment, it must appear that such a consideration was paid therefor. *Tallman v. Hoey.* 537

— *When agreement between attorney and client that former shall have a lien upon all sums recovered, operates as equitable assignment of an award in favor of the latter.*

See Williams v. Ingersoll. 508

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. Where, after an assignment for the benefit of creditors, and after a sale and collection of a portion of the goods and accounts assigned, which sale and collection were made by the assignor and a clerk who had been put in charge by the assignee, the assignors compromised with their creditors, who executed a composition deed, *held*, that as it appeared that commissions on the moneys which were actually received by the assignee would be a fair and reasonable compensation for the services rendered, he was only entitled thereto, not to commissions upon the value of all the assigned property. *In re Hulburt.* 259

2. The provision of the act in relation to such assignments (§ 26, chap. 466, Laws of 1877, as amended by § 7, chap. 818, Laws of 1878), which provides that the assignee shall receive the commissions specified "on the whole sum which will have come into his hands" refers to the money actually received not to the property assigned. *Id.*

3. *It seems* that an assignee may protect himself by an agreement against the contingency of a composition before the conversion of any of the assigned property into money by an agreement with the assignor before he accepts the assignment, for his compensation in such case. *Id.*

4. *It seems*, also, that the court may, in such case, before it will compel the assignee to return the assigned property, order reasonable compensation to be made to him as a condition of such return. *Id.*

5. Where an assignment for the benefit of creditors makes specific provision for the payment of a debt, the assignor cannot prevent the application of the property, in accordance with the terms of the instrument, because of the usurious character of the debt. *Chapin v. Thompson.* 270

6. After the execution of a bond and mortgage, to secure a usurious loan, the borrower executed to the lender, and the latter accepted, a general assignment for the benefit of creditors; in the schedule of creditors contained in the inventory, made pursuant to the statute (Chap. 466, Laws of 1877), was inserted the name of said lender, with the amount of the loan which was described as "for money loaned secured by mortgage," and among the assets the mortgaged lands were included with the statement that they were mortgaged to secure said debt. In an action to foreclose the mortgage brought by an assignee of the mortgagee, *held*, that judgment directing the surrender and cancel-

lation of the bond and mortgage because of the usury was error; that to the extent of the money actually loaned and legal interest thereon, plaintiff was entitled to the benefit of the assignment; that said assignment was not within the statute availing contracts or securities because of usury (1 R. S. 772, § 2), as it was a mere trust or appropriation of property made by the debtor, independent of the usurious contract, which gave to the creditor rights adhering to the trust property until the debt was satisfied or the property applied upon it according to the terms of the trust; also that the fact that the lender was the assignee was immaterial and that plaintiff's rights were in all respects the same as his assignors. *Id.*

ATTACHMENT.

1. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. *Hall v. Brooks.* 33
2. An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor. (Code, § 655.) *Id.*
3. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein, *held*, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. *Id.*
4. After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged unless the United States consented to appear and submit to the jurisdiction of the State court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant discharging the original defendant from liability and directing plaintiff to satisfy the mortgage upon payment into court of the amount due, with costs, with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action, on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff. *Held*, that the order was proper. *Johnston v. Stimmel.* 117
5. Under the Code of Procedure (§§ 232-6), a debt evidenced by a negotiable security, owned by and in the hands of an attachment debtor, could be attached by serving the attachment upon the maker of the security. *Bills v. Nat. Park Bk.* 343
6. While the attachment might be defeated by a subsequent transfer of the security to a *bona fide* holder for value, payment thereof by the maker to one, who to his knowledge did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, was no defense to an action to enforce the lien of the attachment. *Id.*
7. Prior and up to April 27, 1875, the N. O., St. L. & C. R. R. Co. had a deposit account with defendant; the deposits being made by R., its assistant treasurer, and its principal officer in New York, of whose official position defendant was fully informed; on that day said company having a balance to its credit drew its check for the amount, which was certified by defendant, charged to the company and delivered to R. On April 30, 1875, an attachment

against said company was served upon defendant by delivery of a copy with proper notice. The check at that time was still in the possession of R., and was owned by the company. On the same day, shortly after the service of the attachment, and after R. had been informed thereof, he opened an account in his individual name, depositing to the credit thereof the said check and other negotiable securities drawn to his order as assistant treasurer, and belonging to said company. R. had no individual account prior to that date, and defendant had reason to and did believe that the securities were the property of the company, and that the deposit was intended to pay its debts; to which purpose it was afterward applied, being drawn out on the individual checks of R. In an action brought after the going into effect of, and pursuant to the provisions of the Code of Civil Procedure (§§ 677, 678), to recover the attached debt, *held*, that the plaintiffs were entitled to recover; that the certification of the check did not absolutely pay and discharge the deposit account, but the debt evidenced by it was liable to attachment; that the deposit of it by R. in his own name did not vest title in him, and as the debt remained the property of the company, it was properly attached, and the checks having subsequently come to the hands of defendant, it was liable. *Id.*

8. As to whether the law in reference to attaching debts evidenced by negotiable securities has been changed by the Code of Civil Procedure (§§ 648, 649), *quære*. *Id.*

9. A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may, under the Code of Civil Procedure (§ 682), move to vacate the attachment without being made a party to the action. *Nat. Shoe & L. B'k v. Mech. Nat. B'k.* 440

10. Under the National Banking Act (U. S. R. S., § 5798), an attachment is prohibited and may not issue out of a State court against a National

bank which is or is about to become insolvent. *Nat. S. & L. B'k v. Mech. Nat. B'k.* 467

11. The plaintiffs, who were attorneys and counselors, were employed in one or the other capacity by defendant H. in various suits and legal proceedings between him and defendants L. & J. H. Ingersoll; one was an action for malicious prosecution brought by him during the progress of the litigations. H. made an oral agreement with plaintiffs that they should be paid for their services out of any moneys he should obtain or become entitled to from any of the suits or proceedings, and "should have a lien for all sums that might be owing or due them for their said services and for the services of each of them," which lien should be superior to any right he might have. All of these actions and proceedings were finally, by agreement of the parties, submitted to an arbitrator, who among other things awarded to H. \$10,000 as damages for the malicious prosecution. Before said award was made defendant B. recovered a judgment in this State against H., which was assigned to defendant Ivins. Two days before the time fixed by the award for the payment of the \$10,000, Ivins brought an action in Connecticut against H. upon the judgment, an attachment was issued therein which was served in that State on L. Ingersoll who then resided therein, and the sheriff returned the writ with his indorsement that L. Ingersoll disclosed an indebtedness on the part of the garnishees to H. of \$10,000. The Ingersolls had no notice of the lien of plaintiffs upon the award, until after service of the attachment. Ivins, after the commencement of this action, recovered judgment in the Connecticut action, and after return of execution unsatisfied, a *scire facias* was issued according to the law and practice of that State against the Ingersolls, to compel payment by them of the amount of the judgment; they appeared in answer thereto and informed the court of plaintiffs' claim; it ordered notice to be given to plaintiffs of

the attachment proceedings. Plaintiffs did not appear, and the *scire facias* is still pending. Prior to the commencement of this action, brought to enforce plaintiffs' alleged claim and lien upon the award, L. Ingersoll had removed to this State, and all the other parties were then, and at the time the attachment was served, residents therein. *Held*, that the debt created by the award had its *situs* in this State and so was not affected by the attachment; also that, as at the time of the service thereof the debt did not belong to H., nothing was attached, and as to plaintiffs the attachment was a nullity. *Williams v. Ingersoll*. 508

12. *It seems* that the judgment herein may be used to defeat the Connecticut attachment. *Id.*

13. But *held*, that the Ingersolls, if they desire, might have, as part of the judgment herein, an injunction restraining Ivins from proceeding further in the foreign jurisdiction. *Id.*

14. No greater force or efficacy will be given to a foreign than to a domestic attachment. *Id.*

ATTORNEY.

1. An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attorney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability. *Barnes v. Newcomb*. 108

2. The A. M. Life Insurance Co., having been served with an order to show cause why a receiver should not be appointed, retained plaintiff to oppose, which he did. The application was granted. Plaintiff advised, and at the request of the officers took an appeal to the General Term and to the Court of Appeals; the order was affirmed. Afterward, without any specific instructions, but with the knowl-

edge and assent of the officers, plaintiff opposed the confirmation of the report of the actuary. In an action to recover for his services plaintiff testified that he rendered such services under the original general retainer. *Held*, that there was no entire contract, at the time of the original retainer, established, binding the company and its assets for its performance, so as to create a liability on the part of the receiver, payable out of the funds, for services rendered after his appointment; and that plaintiff was only entitled to recover for services rendered before such appointment. *Id.*

8. The plaintiffs, who were attorneys and counselors, were employed in one or the other capacity by defendant H. in various suits and legal proceedings between him and defendants L. & J. H. Ingersoll; one was an action for malicious prosecution brought by him during the progress of the litigations. H. made an oral agreement with plaintiffs that they should be paid for their services out of any moneys he should obtain or become entitled to from any of the suits or proceedings, and "should have a lien for all sums that might be owing or due them for their said services and for the services of each of them," which lien should be superior to any right he might have. All of these actions and proceedings were finally, by agreement of the parties, submitted to an arbitrator, who among other things awarded to H. \$10,000 as damages for the malicious prosecution. In an action to enforce their alleged claim and lien upon the award, wherein the value of plaintiffs' services was found to be more than the amount thereof, *held*, that the agreement operated as an equitable assignment, which attached to the award as soon as it was made, and was good against H. or any attaching creditor, and this, although it was for damages on account of a personal tort; that it was not needful in order to make such assignment or lien valid and effectual that notice thereof should have

been given to the debtors. *Williams v. Ingersoll.* 508

4. *It seems* that such notice would have been necessary only to defeat a subsequent *bona fide* payment by the debtors. *Id.*
5. By the award H. was found indebted to various parties connected with the litigation in specified sums, and among them to J. H. Ingersoll. It was claimed, on behalf of the Ingersolls, that these items should be allowed as offsets. *Held* untenable, as the items were not payable to the two Ingersolls, who owe the amount of the award claimed, and as provision was made for their payment by deduction from another sum due H., to be ascertained as prescribed by the award. *Id.*
6. *It seems* that plaintiffs could claim no general lien, as attorneys, upon the award. *Id.*
7. *It seems* also that plaintiffs could not base their claim to an equitable lien upon the mere promise of H. that they should be paid out of any moneys recovered. *Id.*

ATTORNEY-GENERAL.

The attorney-general, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. *People v. Brooklyn F. & C. I. R. Co.* 75

AWARD.

— *Liability of city of Brooklyn for award for lands taken for street improvement.*

See Sage v. City of Brooklyn. 189

— *When attorney can claim lien for services upon an award in favor of client.*

See Williams v. Ingersoll. 508

BANKS AND BANKING.

1. Defendant received from plaintiffs,

for collection, a check drawn upon a bank in New Jersey, and sent it by mail to the drawee, which was and had been for fifteen years its collecting agent in New Jersey, under an arrangement that all collections made by it for defendant should be credited to the latter in a collection account which was settled once a week. Said drawee, upon receipt, charged the check to the drawer and credited it the amount in said account, and the next day suspended payment. In an action to recover the amount of the check, *held*, that the drawee, under said arrangement, had the right to discharge the drawer and substitute itself as debtor, which it did; and that defendant must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check, and was consequently liable therefor. *Briggs v. Central National Bank.* 182

2. In an action by plaintiff, a married woman, to recover the amount of certain deposits, she proved that she indorsed and delivered to her husband two checks belonging to her, and payable to her order, for the purpose of having the same deposited, in her name, with the defendant. She then produced a bank-book in the usual form, in which the amount of the checks was credited to her as depositor. Defendant offered to show in substance that at the time of the first deposit it was orally agreed between plaintiff's husband and defendant that the deposit should be made to defendant's credit, on condition that the same might be withdrawn by the husband on check drawn by him in plaintiff's name; that the second deposit was also made under a similar agreement, and that the deposits were subsequently so withdrawn. This was objected to and excluded. *Held* no error; that the request of the husband to have the deposit made in the name and to the credit of plaintiff, and a pass-book issued to her, taken in connection with the checks made payable to her, sufficiently disclosed the agency of the husband; that authority to

sign his wife's name to future checks could not be inferred from the fact of his making the deposits; and defendant could not prove an arrangement with him hostile to her interests and beyond the apparent scope of the agency, without proof of actual authority from her. *Bates v. First Nat. Bk.* 286

3. A bank by the certification of a check drawn upon it guarantees the genuineness of the signature of the drawer, represents that it has funds of the drawer in its hands sufficient to meet it, and engages that those funds shall not be withdrawn to the prejudice of any *bona fide* holder of the check. The certification does not import that the body of the check is genuine, or that the funds on deposit are absolutely applicable to the payment of the precise check certified. *Clews v. Bk. of N. Y. Bk'g Ass'n.* 418

4. A draft drawn upon defendant was indorsed by the payee, and mailed to the indorsee; it was presented to and certified by defendant; it was thereafter altered by raising the amount and changing the date, and the payee, and was offered to plaintiff in payment for certain bonds. Plaintiff sent it by a messenger to defendant's banking-house, who presented it during business hours to the paying teller with a request to know if the certification was good. The teller answered "yes," and thereupon plaintiff accepted the draft. Before this, defendant had been notified that the draft had not reached the indorsee, and had been requested to stop payment. In an action to recover the amount of the raised draft, *held* (DANKFORTH and TRACY, JJ., dissenting), that the defendant was not estopped by the statement of the teller from denying its liability; that at the time the draft was presented to its teller defendant owed the plaintiff no duty of active diligence to protect it from the fraud, but was bound only to act in good faith, and in the absence of evidence of bad

faith or negligence, plaintiff could not enforce payment. *Id.*

— *Liability of bank for negligence in collecting draft.*

See F. N. Bank v. F. N. Bank. 412

See NATIONAL BANKS
SAVINGS BANKS.

BANKRUPTCY.

In an action brought by plaintiff as assignee in bankruptcy of A. to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest (U. S. R. S., §§ 5197, 5198), defendant interposed as a defense and proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff thereupon gave in evidence the record of a judgment in his favor in an action in which plaintiff as assignee sued defendant to recover a payment made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment, as, to annul the release, plaintiff was bound to show, not only that at its date defendant had reasonable cause to believe A. to be insolvent, but that he executed it in fraud of the act (U. S. R. S., §§ 5128, 5129, as amended by § 11, chap. 390, Laws of 1874); that proof that a prior payment made by A. to defendant was a fraudulent preference, known to be such, did not establish that a payment by defendant to A. of a debt due the latter was either fraudulent or known to be such. *Getman v. Second National Bank.* 136

— *Discharge in bankruptcy no defense to action to recover damages for false representations.*

See Bradner v. Strang. 299

BILLS, NOTES AND CHECKS.

1. Defendant received from plaintiffs, for collection, a check drawn upon a bank in New Jersey, and sent it by mail to the drawee, which was and had been for fifteen years its collecting agent in New Jersey, under an arrangement that all collections made by it for defendant should be credited to the latter in a collection account which was settled once a week. Said drawee, upon receipt, charged the check to the drawer and credited it the amount in said account, and the next day suspended payment. In an action to recover the amount of the check, *held*, that the drawee, under said arrangement, had the right to discharge the drawer and substitute itself as debtor, which it did; and that defendant must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check, and was consequently liable therefor. *Briggs v. Central Nat. Bank.* 182
2. Defendant having received from plaintiff, for collection, a draft drawn by a Pennsylvania bank, on C., P. & Co., bankers in N. Y., delivered the draft to the drawees on receipt of their check for the amount; this was not presented for payment until the next day, when payment was refused, C., P. & Co. having failed on that day. Defendant thereupon returned the check to C., P. & Co., and received back the draft, demanded payment, caused the same to be protested for non-payment, and the next day served notice of protest upon the drawer. In an action to recover damages for alleged negligence, it was *held*, that defendant was liable, but that as the remedy against the drawer was preserved, defendant was only liable for the actual damages (77 N. Y. 320.) *First Nat. Bank v. Fourth Nat. Bank.* 412
3. On a second trial for the purpose of showing damage to the full amount of the draft, plaintiff offered in evidence a judgment record in an action brought by it in a Pennsylvania court against the drawer, whereby it was adjudged that the acceptance of the check and omission to make due presentment constituted, as between the drawer, the payee and defendant, a payment and discharged the drawer's liability. *Held*, that the record was competent evidence and conclusively established plaintiff's damages to be the full amount of the draft. *Id.*
4. Also *held*, that it was not incumbent upon plaintiff as a condition of recovery to tender the draft to defendant. *Id.*
5. The new trial was had after the going into effect of the law of 1879 (Chap. 588, Laws of 1879), fixing the rate of interest at six per cent. *Held*, that plaintiff was only entitled to interest at that rate for the whole period after the cause of action accrued. *Id.*
6. A bank, by the certification of a check drawn upon it, guarantees the genuineness of the signature of the drawer, represents that it has funds of the drawer in its hands sufficient to meet it, and engages that those funds shall not be withdrawn to the prejudice of any *bona fide* holder of the check. The certification does not import that the body of the check is genuine, or that the funds on deposit are absolutely applicable to the payment of the precise check certified. *Clews v. Bank of N. Y. National Banking Ass'n.* 418
7. One H. executed and delivered to plaintiff a non-negotiable note, made payable on demand, upon the back of which the defendant had written his name. In an action thereon, *held*, that defendant did not, in a commercial sense, become an indorser, but could be treated by plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand; that the statute of limitations then began to run in his favor, and as the action was commenced more than six years after

date of note, it was barred by said statute. *McMullen v. Rafferty.* 456

8. Also *held*, that payments of interest by H., although with the knowledge of defendant, did not prevent the running of the statute; to have that effect they must have been made by him, or for him, by his authorized agent. *Id.*

— *Liability of member of a firm upon indorsements made in name of firm after its dissolution.*

See N. S. & L. Bank v. Herz. (Mem.) 629

BOARD OF AUDIT.

— *Power of General Term on appeal under chap. 444, Laws of 1876, from decision of board of audit.*

See Danolds v. State of New York. 36

— *Power of board of audit to make allowances under contracts with State limited to claims sustained by common-law evidence. (Const., art. 3, §§ 19, 24.)*

See Swift v. State of New York. 52

BONA FIDE HOLDER.

— *When town not estopped, as against bona fide holder, by recital in bonds issued in aid of a railroad.*

See Town of Lyons v. Chamberlain. 578

BONDS.

See TOWN BONDING.

BROKERS.

1. Plaintiffs employed the defendants, who were brokers, to purchase for them a specified amount of U. S. bonds, the latter agreeing to loan and advance the purchase-price. Defendants purchased in their own names the amount of bonds specified, and reported to plaintiffs a purchase on their account at a price greater than that paid; subsequently, without knowl-

edge of the overcharge and upon an agreement on the part of defendants to carry the original bonds purchased for plaintiffs' account to a specified date at a rate of interest agreed upon, the latter paid certain charges for commissions and alleged expenses, and also \$10,000 on the purchase-price. Defendants, before the time of credit expired, sold the bonds purchased, without notice to, or the knowledge or assent of plaintiffs. *Held*, that upon obtaining knowledge of the facts plaintiffs were entitled to repudiate the purchase and to recover back the moneys paid. *Levy v. Loeb.* 386

2. Plaintiffs consigned certain merchandise to the firm of E. & C. S. for sale, which firm employed defendants as brokers to and they did make the sale, with knowledge that E. & C. S. were not the sole owners of the goods, or under circumstances sufficient to put them upon inquiry. Soon after the proceeds of sale came into defendants' hands an attachment was served upon them, issued in an action brought by other creditors of E. & C. S. against them. No portion of the proceeds was taken under the attachment. But, after defendants had been fully notified of plaintiffs' claim, they were examined in supplementary proceedings, after judgment in said action, and testified that they owed E. & C. S. the balance of the proceeds of such sale, concealing the claim and ownership of plaintiffs. An order was made that they pay over such balance to the sheriff, which they did. *Held*, that such payment was no defense, as defendants had it in their power, by stating the facts, to prevent the making of the order, and it was their duty so to have done; having omitted this duty without reason or excuse, their payment was, in effect, voluntary. *Wright v. Cabot.* 570

BROOKLYN (CITY OF).

1. Where the verification of an assessment-roll in the city of Brooklyn was by affidavit containing the

- statements "provided by law in regard to assessments in the different towns of this State," but omitted the statement required by the charter of said city (§ 31, tit. 4, chap. 884, Laws of 1854, as amended by § 21, chap. 63, Laws of 1862), to the effect that the assessors "have together personally examined, within the year past, each and every lot and parcel of land, house, building or other assessable property within the ward," *held*, that the omission was a substantial defect which invalidated the tax and a sale made because of non-payment thereof; and that plaintiff, who had purchased at the sale, under an agreement with the city that in case of any irregularity in the proceedings prior to the sale, the purchase-money should be refunded, could, after demand and refusal, recover back the moneys paid. *Brevort v. City of Brooklyn.* 128
2. A lot was bid off by the registrar of arrears for the city, and a certificate of the sale issued which the registrar sold and assigned to plaintiff under a similar agreement. *Held*, that the registrar had authority to bid in the land, sell the certificate and warrant the validity thereof. *Id.*
3. The act of 1868 (Chap. 631, Laws of 1868), widening Sackett street in the city of Brooklyn, provided for a municipal, not a State improvement, and imposed upon the city the ultimate duty of paying the land-owners for the lands taken. (RAPALLO and EARL, JJ., dissenting). *Sage v. City of Brook-* 189
4. The provision of the city charter of 1854 (§ 16, tit. 4, chap. 884, Laws of 1854), directing the city comptroller to pay to persons to whom damages have been allowed for lands taken for street improvements, which provision is made applicable to proceedings under said act of 1868 (§ 7), imposes a duty upon the corporate body, the city, not by a *descriptio personarum* upon the individual holding that office. (RAPALLO and EARL, JJ., dissenting.) *Id.*
5. Where, therefore, lands of plaintiffs were taken for said improvement and an award made to them therefor by the commissioners of estimate and assessment, but the comptroller refused to pay the award, as the assessment made for the improvement was only collected in part, and the amount collected was paid out in payment of claims presented before the presentation of plaintiffs', *held*, that an action was maintainable against the city to recover the sum awarded. (RAPALLO and EARL, JJ., dissenting.) *Id.*
6. Also *held*, that the exemption clause in the act of 1862 (§ 39, chap. 63, Laws of 1862) was not applicable. (RAPALLO and EARL, JJ., dissenting.) *Id.*
7. The commissioners appointed under the act of 1866 (Chap. 826, Laws of 1866) to grade and improve Union street in the city of Brooklyn, in the prosecution of the work constructed a swing-bridge on the street across Gowanus canal, and made and filed their report, and so transferred the bridge to the common council, as required by the act. No barriers were constructed to protect persons in the street from falling into the canal when the draw was open. Plaintiff, in endeavoring to save an infant brother who was about to go upon the bridge just as it was being swung open, slipped between the sidewalk and the bridge and was injured. In an action against defendants, the commissioners of the department of public works, to recover damages, it appeared that at the time of the accident the bridge and street were in the same condition as when transferred to the city, and that it was in charge of a keeper appointed by the police commissioners. Said keeper had previously notified the assistant engineer attached to the board of city works that the place was dangerous, and that two accidents had happened. *Held*, that defendants were not liable; that assuming

they could be made liable for damages sustained by reason of defects negligently suffered to exist in a street by virtue of the provisions of the city charter of 1873 (Title 14, chap. 863, Laws of 1873), conferring upon the commissioners of said department the control and care of the city streets, no such liability was incurred here, as the street was in no sense out of repair, and the danger arose simply from the opening of the bridge by a keeper not under the control of defendants, but appointed by and under the control of the police board (see said charter, § 62, title 11), and defendants had no authority to appoint keepers to guard the approaches when the draw was open. *Fitzpatrick v. Slocum*. 358

8. Also, that no liability was imposed upon defendants by the provisions of the act of 1874, amending said charter (§ 81, chap. 589, Laws of 1874) which requires the commissioners of the city works, in case any street becomes dangerous, to examine and repair the same, as neither the street nor the bridge were dangerous of themselves and were only made so by operating the latter. *Id.*

9. *It seems* that the provision of said charter (§ 27, title 19), providing that the city shall not be liable for the misfeasance or nonfeasance of its officers, but that the officer guilty thereof shall be liable, does not exempt the city from liability for failure to discharge a duty resting upon it, and which it has not devolved upon any of its officers, and that the liability for not guarding the bridge sufficiently when it was being operated for public use rested upon the city, and the remedy is against it. *Id.*

BUILDING CONTRACT.

Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work con-

tracted for could not be completed until other work to be done by the owner was finished, *held*, that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged him from liability for the liquidated damages; and this although some work not affected by the delay of the owner was not completed within the time; that as the damages were payable upon a failure of entire completion, which was rendered impossible by the owner's act, a recovery could not be had for a failure which she made inevitable. *Weeks v. Little*. 566

CASES REVERSED, DISTINGUISHED, ETC.

Baucus v. Stover (24 Hun, 109), reversed. *Baucus v. Stover*. 1

N. Y. S. M. Milk Pan Ass'n v. Rem. Ag. Works (25 Hun, 475), reversed. *N. Y. S. M. Milk Pan Ass'n v. Rem. Ag. Works*. 22

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Hall v. Brooks (25 Hun, 577), reversed. *Hall v. Brooks*. 33

McKee v. U. S. (12 Ct. Claims, 504; 97 U. S. 233), distinguished. *Danolds v. The State* 49

Swift v. The State (26 Hun, 508), reversed. *Swift v. The State*. 52

In re Upson (24 Hun [Mem.], 650), reversed. *In re Upson*. 67

Att'y-Gen. v. N. Am. L. Ins. Co. (26 Hun, 294), modified. *Att'y-Gen. v. N. Am. L. Ins. Co.* 94

Brevoort v. City of Brooklyn (18 Hun, 383), reversed. *Brevoort v. City of Brooklyn*. 128

Wager v. Wager (21 Hun, 93), reversed. *Wager v. Wager*. 161

- Chipman v. Montgomery* (63 N. Y. 221), distinguished. *Wager v. Wager*. 168
- Indig v. Nat. City B'k* (80 N. Y. 100), distinguished. *Briggs et al. v. Cent. Nat. B'k*. 184
- Johnson v. Town of Irasburgh* (47 Vt. 28; 19 Am. Rep. 111), disapproved. *Platz v. City of Cohoes*. 224
- Holcomb v. Town of Danby* (51 Vt. 428), disapproved. *Platz v. City of Cohoes*. 224
- Bosworth v. Swansea* (10 Metc. 368), disapproved. *Platz v. City of Cohoes*. 224
- Jones v. Andover* (10 Allen, 18), disapproved. *Platz v. City of Cohoes*. 224
- Schultz v. Third Ave. R. R. Co.* (14 J. & S. 211), reversed. *Schultz v. Third Ave. R. R. Co.* 242
- Robbins v. Robbins* (15 J. & S. 193), reversed. *Robbins v. Robbins*. 251
- In re Bunch* (12 Wend. 280), distinguished. *In re Hulburt*. 264
- Enoch Morgan's Sons' Co. v. Trozell* (23 Hun, 632), reversed. *Enoch Morgan's Sons' Co. v. Trozell*. 292
- Hennequin v. Clews* (77 N. Y. 429; 33 Am. Rep. 641), distinguished. *Bradner v. Strang*. 306
- Neal v. Clark* (95 U. S. 704), distinguished. *Bradner v. Strang*. 306
- Harris v. Perry* (23 Hun, 244), reversed. *Harris v. Perry*. 308
- Johnson v. Humboldt Ins. Co.* (91 Ill. 93; 33 Am. Rep. 47), disapproved. *Steen v. Nia. F. Ins. Co.* 324
- Fullam v. N. Y. Un. Ins. Co.* (7 Gray, 61), disapproved. *Steen v. Niag. F. Ins. Co.* 324
- Walsh v. Hartford F. Ins. Co.* (73 N. Y. 5), distinguished. *Steen v. Nia. F. Ins. Co.* 327
- Van Allen v. Farmers' J. S. Ins. Co.* (64 N. Y. 467), distinguished. *Steen v. Nia. F. Ins. Co.* 327
- Marvin v. Universal L. Ins. Co.* (8 N. Y. 278), distinguished. *Steen v. Nia. F. Ins. Co.* 327
- Handy v. Draper* (23 Hun, 256), reversed. *Handy v. Draper*. 334
- Bills v. Nat. Park Bk.* (15 J. & S. 302), reversed. *Bills v. Nat. Park Bk.* 343
- Neilley v. Neilley* (23 Hun, 651), reversed. *Neilley v. Neilley*. 352
- Gray v. City of Brooklyn* (2 Abb. Ct. App. Dec. 267), distinguished. *Fitzpatrick v. Slocum*. 366
- Levy v. Loeb* (15 J. & S. 61), reversed. *Levy v. Loeb*. 386
- Gruman v. Smith* (81 N. Y. 25), distinguished. *Levy v. Loeb*. 389
- Capron v. Thompson* (86 N. Y. 418), distinguished. *Levy v. Loeb*. 389
- In re Blodgett* (27 Hun, 12), reversed. *In re Blodgett*. 392
- In re Curser* (25 Hun, 579), reversed. *In re Curser*. 401
- West v. Mapes* (4 Redf. 496), overruled. *In re Curser*. 403
- First Nat. Bk. v. Fourth Nat. Bk.* (24 Hun, 241), modified. *First Nat. Bk. v. Fourth Nat. Bk.* 416
- Clews v. Bk. N. Y. Nat. Bkg. Assn.* (8 Daly, 476), reversed. *Clews v. Bk. N. Y. Nat. Bkg. Assn.* 418
- Wood v. Robinson* (22 N. Y. 564), distinguished. *Murphy v. Briggs*. 452
- In re N. Y. & W. S. R. R. Co.* (27 Hun, 57), reversed. *In re N. Y. & W. S. R. R. Co.* 453
- Mayor, etc., v. Cunliff* (2 N. Y. 165), distinguished. *Devlin v. Smith*. 477
- Loop v. Litchfield* (42 N. Y. 351), distinguished. *Devlin v. Smith*. 479

Losee v. Clute (51 N. Y. 494), distinguished. *Devlin v. Smith.* 479

Riggs v. Cragg (26 Hun, 90), reversed. *Riggs v. Cragg.* 479

Bevan v. Cooper (72 N. Y. 817) distinguished. *Riggs v. Cragg.* 489

People, ex rel. Stanton, v. Tioga Com. Pleas (19 Wend. 73), distinguished. *Williams v. Ingersoll.* 518

Watts v. Porter (3 E. & B. 743), stated to have been overruled. *Williams v. Ingersoll.* 522

In re Mut. L. Ins. Co. (27 Hun, 22), overruled as to chapter 226, Laws of 1871. *In re Mut. L. Ins. Co.* 530

Welsh v. Gossler (15 J. & S. 104), reversed. *Welsh v. Gossler.* 540

In re Lowden (25 Hun, 434), modified. *In re Lowden.* 548

Prov. & S. S. S. Co. v. Phoenix Ins. Co. (22 Hun, 517), reversed in part. *Prov. & S. S. S. Co. v. Phoenix Ins. Co.* 559

Weeks v. Little (15 J. & S. 1), reversed in part. *Weeks v. Little.* 566

Lyons v. Munson (99 U. S. 684), distinguished. *Town of Lyons v. Chamberlain.* 588

Dunlop v. Avery (23 Hun, 509), reversed. *Dunlop v. Avery.* 592

Schultz v. Schultz (27 Hun, 26), reversed. *Schultz v. Schultz.* 644

CAUSE OF ACTION.

An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attorney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability. *Barnes v. Newcomb.* 108

— When person interested in estate may bring action to construe will. See *Wager v. Wager.* 161

CODE OF CIVIL PROCEDURE.

- § 340. *Coe v. Raymond.* (Mem. 612
 §§ 440, 441. *M. N. Bank v. P. N. Bank.* 397
 §§ 648, 649. *Bills v. N. P. Bk.* 343
 §§ 655. *Hall v. Brooks.* 43
 §§ 677, 678. *Bills v. N. P. Bk.* 343
 § 682. *N. S. & L. Bank v. M. N. Bank.* 440
 § 722. *Schultz v. T. A. R. R. Co.* 242
 § 723. *N. Y. S. M. M. P. Assn. v. Rem. Ag. Works.* 22
 § 787. *M. N. Bk. v. P. N. Bk.* 397
 § 1440. *McIntyre v. Sanford.* 634
 §§ 2545. *Baucus v. Stover.* 1
 §§ 2662. *In re Curser.* 401

CODE OF PROCEDURE.

- § 30. *Coe v. Raymond.* (Mem.) 616
 § 99. *Maples v. Mackey.* 143
 §§ 232, 236. *Bills v. N. P. Bk.* 346
 §§ 375, 379. *Maples v. Mackey.* 146

COMMISSIONS.

— Of receiver of insolvent life insurance company, how fixed and upon what assets allowable. See *Atty.-Genl. v. N. A. L. Ins. Co.* 94

— Of assignee for benefit of creditors on compromise by assignor with creditors. See *In re Hulbert.* 259

COMMISSION (TO TAKE TESTIMONY).

1. On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception.

Held no error; that while defendants were entitled to the whole of the letters, their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. *Wright v. Cabot*. 570

2. Where there has been an opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the return, no objections because of such imperfect execution will be heard on the trial. *Id.*

COMMITMENT

1. Where the petition on application for a writ of *habeas corpus* to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument under and by virtue of which he detained the relator, but simply required a return of the cause of his imprisonment, *held*, that certified minutes of the court showing judgment and the sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant. *People, ex rel. Trainor, v. Baker*. 460
2. *It seems* that a warrant of commitment in such case is simply an authority and direction to the sheriff or other officer to take the prisoner to the penitentiary; he is not detained by virtue thereof, but by virtue of the judgment, and if the officer furnishes the keeper with a certified copy of the judgment, it is sufficient evidence of his authority, and he need not retain the *mittimus*. *Id.*
3. *It seems* also if the prisoner has been properly and legally sentenced to prison he cannot be re-

leased, because of a defect in the *mittimus*. When he is safely in the proper custody, there is no office for a *mittimus* to perform. *Id.*

COMMON CARRIER.

1. A shipping contract will not be construed as exempting the carrier from liability for his own negligence, unless the intent is so plainly and distinctly expressed as that it cannot be misunderstood by the shipper; it cannot be inferred from general words in the contract. *Nicholas v. N. Y. C. & H. R. R. R. Co.* 370
2. Plaintiff shipped a quantity of fruit trees by defendant's road; the shipping contract, among a great number of special exemptions from liability on the part of the carrier, contained the following, for "damage occasioned by delays from any cause or from change of weather." The trees were lost by the negligent delay of defendant in the transportation. In an action to recover damages, *held*, that such a loss was not covered by the exemption, and that defendant was liable. *Id.*

COMMON SCHOOLS.

1. The superintendent of public instruction has no power to remove the principal of a normal school established under the act of 1866 (Chap. 466, Laws of 1866), without the concurrence of the local board. *People, ex rel. Gilmour, v. Hyde*. 11
2. The provision of said act (§ 4) declaring that the "employment" of teachers in said schools shall be subject to the approval of the superintendent, refers to the act of hiring. When the approval is once given, the contract of employment is complete, and the teacher can only be discharged by the authority in whom the power to employ is vested, *i. e.*, by the concurrent act of the local board and the superintendent. *Id.*
3. It is not within the power of the

superintendent, by annexing conditions to his approval, to change the law regulating the discharge of teachers of these schools. *Id.*

4. The local board of a normal school employed one H. as principal, which employment was approved by the superintendent "to continue in force during the pleasure of the board and the superintendent;" thereafter the superintendent withdrew his approval and directed the local board to recommend another principal, and upon its declining so to do, made an appointment himself which the board refused to recognize. In proceedings by *mandamus* to compel such recognition, *held*, that the superintendent had no authority to attach to his approval the qualification stated; that, notwithstanding the action of the superintendent, H. remained principal, and the refusal of the board to make a new appointment was not an omission "to discharge its duties" within the meaning of the amendatory act of 1869 (Chap. 18 Laws of 1869), and so did not authorize the superintendent to discharge such duties. *Id.*

CONFLICT OF LAWS.

— *A debt created by an award made in this State, when debtor resides here, has its situs in this State, and cannot be affected by foreign attachment.*

See Williams v. Ingersoll. 508

CONSTITUTION.

— *Power of board of audit to make allowances under contracts with State, limited to claims sustained by common-law evidence. (Const., art. 3, §§ 19, 24.)*

See Swift v. State of N. Y. 52

CONSTITUTIONAL LAW.

1. The constitutional provision which denies to the State the power to pass laws impairing the obligations of contracts applies as well to con-

tracts made by the State as to those made by individuals. *Dan-olds v. State.* 36

2. The title of the act of 1872 (Chap. 872, Laws of 1872), entitled "An act in relation to the Croton aqueduct and other public works in the city of New York," sufficiently states the subject of the act, and so it is not obnoxious to the provision of the State Constitution (Art. 3, § 16), requiring the subject of a local or private bill to be expressed in its title. *In re Upson.* 67
3. The provision of the State Constitution (Art. 3, § 18) prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws. *People v. B'klyn F. & C. I. R. Co.* 75
4. Accordingly *held*, that said provision did not affect the provision of the Railroad Act of 1839 (§ 1, chap. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations "for the use of their respective roads; and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision. *Id.*
5. Also *held*, that the act of 1876 (Chap. 187, Laws of 1876), authorizing the use of steam in drawing cars on Atlantic avenue, Brooklyn, was not violative of the provision of the State Constitution (Art. 3, § 18), which prohibits the passage of any private or local bill granting "any exclusive privilege, immunity or franchise whatever." *Id.*
6. Also *held*, that the question, whether said act was violative of the constitutional prohibition

formed and material furnished up to the time of giving the certificate amounted to at least fifteen per cent more than the amount of that and prior installments, the last installment to be paid when the entire work was "fully completed." *Held*, that the contract provided for a completed work at the fixed sum named; the intent being to prevent the necessity of measurements and computations after it was executed; and that plaintiff's legal rights were limited to the contract-price, save as to alterations provided for. *Swift v. State.* 52

11. The contract authorized alterations to be made, and it was provided that "if such alterations increase the amount of the work, such increase shall be paid for only according to the quantity actually done and at the prices fixed in such proposal for similar work," to be determined by the engineer; after the completion of the work, the engineer gave a certificate of that fact, also stating that certain alterations had been made, which increased the amount of work in the sum of \$12,351.77. Plaintiff, knowing the contents of the certificate, received by virtue thereof the balance unpaid of the sum specified in the contract, and the sum specified in the certificate for the additional work, giving a receipt, stating that it was "in payment of the balance due him." Plaintiff presented a claim to the board of audit for a further sum which was allowed. There was no claim or evidence of error or mistake on the part of claimant in giving the receipt. On appeal as authorized by the act of 1881 (Chap. 211, Laws of 1881), *held*, that the claimant was not entitled to a further sum under or by virtue of the contract; that the adjustment by the engineer with the knowledge of the claimant and the receipt by him as a final payment concluded him from making a further demand against the State; also, that there was no moral consideration upon which the claim could be based. *Id.*

12. The State engineer and surveyor
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was required by resolution of the legislature to make a survey and estimate of the amount of work done under the contract; said engineer made a report, stating in substance, that his deputy had made the survey and estimate required. The deputy testified that in making measurements to distinguish between work done under this contract and a subsequent contract relating to the same matter, he received his data entirely from one H., and that the computation was not based upon exact measurements; it appeared that it was impossible to distinguish between the work done under the two contracts. Upon this estimate and information received from others, the engineer reported the work done by claimant, at the prices specified, amounted to \$39,375.12 in excess of what he had received. The claim and allowance was for this excess. *Held*, that the question before the board was to be determined upon common-law evidence; that the report of the engineer was no evidence, and there was nothing to sustain the allowance. (State Const., art 3, §§ 19, 24.) *Id.*

13. Plaintiff on September 21, 1877, purchased in St. Louis a ticket for a passage from that city to New York over the several railroads mentioned in coupons annexed. It was specified on the ticket that it was "good for one continuous passage to point named in coupon attached;" also that the company selling the ticket acted only as agent for the other roads, and assumed no responsibility beyond its own line, and that the holder of the ticket agreed with the several companies "to use the same on or before" September 26, and if he failed so to do, either of the companies might refuse to accept the ticket and demand full fare. Plaintiff left St. Louis on the day he bought the ticket; he stopped over at Cincinnati and at Cleveland; he reached Buffalo the 24th, having used all the coupons except one entitling him to passage over defendant's road; he stopped there a day and then purchased a ticket from Buffalo to Rochester, where

he remained until the afternoon of the 26th, when he took passage for New York. He presented his ticket to the conductor; it was accepted and punched several times, but when the train reached Hudson, about 3 A. M., September 27, the conductor declined to recognize the ticket, and upon plaintiff's refusal to pay fare to New York, ejected him from the car. On the trial of an action to recover damages, after proof of these facts, plaintiff was nonsuited. *Held* error; that the contract evidenced by the ticket was not by any one company, or jointly by all the companies named, but was a separate contract by each company for a continuous passage over its road; that plaintiff was not bound to commence his passage on defendant's road at Buffalo, but could commence it at any intermediate point between that city and New York, being only required when commenced to make it continuous; that plaintiff having commenced his passage on the 26th, having presented his ticket and the same having been accepted, it was then used within the meaning of the contract, and as it was not specified that the passage should be completed on that day, he was entitled to go through on the ticket. *Auerbach v. N. Y. C. & H. R. R. Co.* 281

14. Where, upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, *i. e.*, the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers.* 527

- 15. Defendants, who were doing business in New York, contracted with one F. to sell him a quantity of sugar to be sent from St. Vin-

cent, and to be "May-June shipment." The purchase-money to be paid at the port of departure F. thereupon applied to plaintiffs for, and received from them, a letter of credit to their correspondents in London, which, by its terms, expired unless used before June 30, and required a May or June shipment, and bills of lading to plaintiff's order; this was delivered by F. to defendants; at defendants' request a credit by telegram was substituted, the form and language of which was dictated and proposed by defendants. It contained no prohibition as to use later than June. No change, however, was made in the original contract. No shipment of sugar was made until July, when a cargo was shipped, the bills of lading being made to plaintiffs, and the credit was used therefor. On arrival of the sugars at New York, F. refused to receive them, because not shipped in compliance with the contract. Plaintiffs thereupon notified defendants that they could not receive them for F., and offered to surrender them upon payment of the advances. Upon their refusal to take them, and after due notice, plaintiffs sold the sugars. In an action to recover the balance of the advances after application of the proceeds of sale, *held*, that F. was not bound to accept sugars shipped in July; that neither defendants nor their representatives at St. Vincent acquired a right to use the credit after June 30, although the form of the telegraphic credit enabled them to do so; that in substance and effect defendants took plaintiffs' money as a forced loan or advance upon the consignment of the sugars to be sold on commission on their account; that plaintiffs, therefore, were entitled to recover, and a nonsuit was error. *Welsh v. Gossler.* 540

— Where upon trial, parol evidence is given without objection as to terms of contract in addition to the written contract, and the question as to what the contract was is thus submitted as a question of fact, and there is evidence sufficient to sustain a verdict, it is conclusive here.

See DeBenoise v. P. & S. S. Co.
(*Mem.*) 614

See BUILDING CONTRACT.
COVENANTS.

CONVERSION.

Plaintiff's complaint in an action for conversion of personal property, alleged in substance the execution and delivery to plaintiff by W., the then owner, of a chattel mortgage upon the property, a demand of payment, and that "thereupon, pursuant to said mortgage, plaintiff was entitled to the immediate possession and control of the property so mortgaged and became the owner thereof, and thereupon took the same into his possession," and while lawfully and quietly possessed thereof, that defendant wrongfully took and converted the same. A copy of the mortgage was attached. By its terms, the debt secured by the mortgage was payable on demand. Defendants demurred, claiming that the complaint was defective in not averring that default had been made in the payment of the mortgage. *Held* untenable; that the allegations of ownership and lawful possession were sufficient without setting forth in detail how title was acquired; and also that a default was clearly to be implied from the facts stated. *Malcom v. O'Reilly.* 156

CORPORATIONS.

A law creating a corporation may impose upon parties dealing with it such restrictions as the enacting power may deem proper in applying or subjecting its assets to the discharge of its obligations, and may provide that any one or more of the usual remedies of creditors shall in certain cases be withheld from them. *Nat. S. & L. Bk. v. Mech. Nat. Bk.* 467

— *Liability of, to taxation under act chapter 542, Laws of 1880.*

See N. G. L. Co. v. City of Brooklyn. 409

See INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COUNTER-CLAIM.

Defendant's answer in an action for trespass set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim. *Held*, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. *Mairs v. Manhattan R. E. Assn.* 498

COUNTY COURT.

— *When question as to jurisdiction of County Court is one of fact and so not reviewable here.*

See Coe v. Raymond. (Mem.) 612

COURTS.

See COURT OF APPEALS.
COUNTY COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

1. It is the duty of this court to determine a constitutional question only when it is directly and necessarily involved in the issue to be determined. *People v. B. F. & C. I. R. R. Co.* 75
2. *It seems* that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. *Id.*

COVENANTS.

1. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Dunlop v. Avery.* 592
2. Such a covenant is not one running with the land, but is entirely personal in its character. *Id.*

DAMAGES.

1. Where, upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, *i. e.*, the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers.* 527
2. *It seems* that if the trial is before the expiration of the term, plaintiff is entitled to recover such actual damage as the evidence shows he has sustained up to time of trial, and if at that time the loss is still only probable, the recovery should be for nominal damages only. *Id.*
3. Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work contracted for could not be completed until other work to be done by the owner was finished, *held*, that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged him from liability for the liquidated dam-

ages; and this although some work not affected by the delay of the owner was not completed within the time; that as the damages were payable upon a failure of entire completion, which was rendered impossible by the owner's act, a recovery could not be had for a failure which she made inevitable. *Weeks v. Little.* 566

— *Extent of liability of bank for negligence in collecting a draft and as to allowance of interest as damages.*
See F. N. Bank v. F. N. Bank. 412

— *Interest properly allowed as item of damages in action of trespass.*
See Mairs v. M. R. E. Assn. 498

DEATH.

1. When one injured by the wrongful act, neglect or default of another brings suit and recovers damages for the injury in his life-time, in case death subsequently results from the injury, his personal representatives cannot maintain an action under the act of 1847 (Chap. 450, Laws of 1847). *Littlewood v. Mayor, etc.* 24
2. Said act was not intended to impose a double liability, but simply to give a right of action where a party, having a good cause of action for a personal injury, was prevented, by death resulting from such injury, from enforcing his right, or who omitted in his life-time so to do. *Id.*
3. *It seems* that the legislature has the power to create the double liability. *Id.*

DEBTOR AND CREDITOR.

A law creating a corporation may impose upon parties dealing with it such restrictions as the enacting power may deem proper in applying or subjecting its assets to the discharge of its obligations, and may provide that any one or more of the usual remedies of creditors shall in certain cases be withheld

from them. *Nat. S & L B'k v. Mech. Nat. B'k.* 487

See FRAUDULENT CONVEYANCES.

DECEIT.

See FRAUD.

DEED.

— When general terms in deed cover and convey lands not particularly described.

See *Sanders v. Townshend.* (Mem.) 623

DEFENSE.

Plaintiffs consigned certain merchandise to the firm of E. & C. S. for sale, which firm employed defendants as brokers to and they did make the sale, with knowledge that E. & C. S. were not the sole owners of the goods, or under circumstances sufficient to put them upon inquiry. Soon after the proceeds of sale came into defendants' hands, an attachment was served upon them, issued in an action brought by other creditors of E. & C. S. against them. No portion of the proceeds was taken under the attachment. But, after defendants had been fully notified of plaintiffs' claim, they were examined in supplementary proceedings, after judgment in said action, and testified that they owed E. & C. S. the balance of the proceeds of such sale, concealing the claim and ownership of plaintiffs. An order was made that they pay over such balance to the sheriff, which they did. *Held*, that such payment was no defense, as defendants had it in their power, by stating the facts, to prevent the making of the order, and it was their duty so to have done; having omitted this duty without reason or excuse, their payment was, in effect, voluntary. *Wright v. Cabot.* 570

— Discharge in bankruptcy no defense to action to recover damages for false representations.

See *Bradner v. Strang.* 299

— When equities existing as between mortgagor and mortgagee cannot be availed of by former in action to foreclose brought by assignee of mortgage.

See *Riggs v. Purcell.* (Mem.) 608

DEPOSITION.

See COMMISSION (TO TAKE TESTIMONY).

DESCENT.

1. Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors, and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title, and the heirs are entitled at law to the intermediate rents and profits. *Lent v. Howard.* 169

2. Where a testator, whose will authorized his executor to sell all his real and personal estate, and disposed of the proceeds, after the making thereof, had a child born, and thereafter died, leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," *held*, that under the statute (2 R. S. 65, § 49), the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of sale, but that she could maintain ejectment to recover the same. *Smith v. Robertson.* 555

DEVISE.

See WILLS.

EJECTMENT.

1. Where a testator, whose will au-

thorized his executor to sell all his real and personal estate, and disposed of the proceeds, after the making thereof, had a child born, and thereafter died leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," *held*, that under the statute (2 R. S. 65, § 49), the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of sale, but that she could maintain ejectment to recover the same. *Smith v. Robertson*. 555

2. Where, however, it appeared that the real estate was at the time of the testator's death subject to a mortgage which the grantee paid, *held*, that the judgment should be without prejudice to his right to a lien for the amount so paid, or to be subrogated to the rights of the mortgagee. *Id.*

EMINENT DOMAIN.

1. A law authorizing the taking of a man's land, without the pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the compensation, but remitting the owner for his sole remedy to a fund to be obtained by taxation, according to benefits, of certain specified lands in a limited assessment district, is not a sure and adequate provision, dependent upon "no hazard, casualty or contingency whatever," such as is required to meet the constitutional prohibition against the taking of private property without making compensation. *Sage v. City of B'klyn.* 189
2. In proceedings by a railroad corporation to acquire title to lands under the water of the Hudson river which had been granted by the State to the owners of the uplands, the petition contained an

offer on the part of the company to construct a draw-bridge to give access from the river to the docks of the land-owners. After an order had been made and appealed from appointing commissioners, on application of the company an order was granted giving it leave to withdraw the offer and to amend the petition accordingly. *Held*, that the court had no power to so amend the petition; that no such power was given by the provision of the General Railroad Act (§ 20, chap. 140, Laws of 1850), which authorizes the correction of "any defect or informality." *In re N. Y. & W. S. R. R. Co.* 453

EQUITY.

— *Jurisdiction of, to construe wills and to compel accounting by executors.*
See Wager v. Wager. 161

— *When equity will not enforce technical legal title to securities.*
See Robbins v. Robbins. 251

ESTOPPEL

— *When bank not estopped by statements of its teller from disputing its liability upon a raised draft.*
See Clow v. Bank of N. Y. 418

— *When town not estopped, as against bona fide holder, by recital in bonds issued in aid of a railroad.*
See Town of Lyons v. Chamberlain. 578

— *When mortgagor estopped, by declaration that mortgage is good for the whole amount, from setting up defense thereto.*
See Riggs v. Purcell. (Mem.) 608

EVIDENCE.

1. In an action against a street railroad company to recover damages for an injury, the evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and an-

other witness for defendant that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order, so as to fix the company with liability, in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded. *Held* error. *Schultz v. Third Ave. R. R. Co.* 242

2. It is competent for a party against whom a witness has been called to prove acts or declarations of his, showing feelings of hostility or malice on his part toward such party. If upon cross-examination he denies such facts, they may be proved by other witnesses, as the inquiry into his state of feeling toward the party is not collateral. *Id.*

3. *It seems*, however, that the evidence to show hostile feelings of a witness should be direct and positive and not very remote. *Id.*

4. Prior to March 27, 1875, plaintiffs, who were partners doing business at Rochester, had had extensive business transactions with defendants, who were commission merchants in New York, and the parties had been in the habit of exchanging credits. Plaintiffs had sent to the defendants four notes to take up other paper about maturing, which notes defendants had negotiated and used. On that day defendant S. wrote to plaintiffs, stating in substance that they had not used said notes and had themselves paid the paper they were given to renew. And on April 2, 1875, said defendant wrote again asking for four other notes. These plaintiffs sent in reliance upon the statements that the other notes had not been used. Defendants received and negotiated them, using the proceeds. Soon after defend-

ants failed; petitions in bankruptcy were filed against them and they were discharged, being then indebted to plaintiffs on all their accounts and transactions about \$1,000, aside from the proceeds of the four notes, which having passed into the hands of *bona fide* holders, plaintiffs were obliged to pay. In an action to recover damages because of the false representation, *held* that plaintiffs were properly allowed to testify that they sent the last notes in reliance upon said representations; and that a refusal to permit the defendants H. to testify that they did not have any intention to defraud was not error; nor was a refusal to allow defendants to testify for what purpose the last four notes were obtained. *Bradner v. Strang.* 299

5. Plaintiff B. testified, without objection, that a few months after the failure he was told by defendant S. that when he got his discharge he would have the ability and disposition to make an honorable settlement with plaintiffs. Defendants' counsel requested the court to charge the jury to disregard such evidence. The court made no mention of it in its charge. *Held*, that the evidence was immaterial and the refusal to grant the request was not error. *Id.*

6. *It seems* that if the evidence was regarded by defendants' counsel as prejudicial, it should have been objected to when offered. *Id.*

7. Where the certified copy of the minutes of the court furnished the keeper of a penitentiary imperfectly described the crime of which the prisoner was convicted, *held*, that the keeper could, upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was; and so, that the sentence was legal, and the detention authorized. *People, ex rel. Trainor, v. Baker.* 460

8. *It seems* that this cannot be shown by parol evidence, but should be proved by the records. *Id.*

— Where, although question to

witness is too broad, the answer is confined to precise issue, there is no error.
See Wright v. Cabot. 570

EXCEPTIONS.

Exceptions taken upon the trial of specific questions of fact arising in an equity action and ordered to be answered by a jury should be presented for review before final judgment; they may not be considered on motion for a new trial of the action after judgment.
Chapin v. Thompson. 270

EXECUTION.

The provision of the Code of Civil Procedure (§ 1440, as amended by § 2, chap. 681, Laws of 1881), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee.
McIntyre v. Sanford. 684

EXECUTORS AND ADMINISTRATORS.

1. Under the provision of the Revised Statutes (2 R. S. 84, § 13) declaring that any just claim which a testator had against one named as executor of his will shall be included in the inventory, "and such executor shall be liable for the same as for so much money in his hands * * * and he shall apply and distribute the same in the payment of debts," etc., an executor, although insolvent at the time of his appointment, is bound to account for a debt so due from him, and should be charged therewith on settlement of his accounts as for so much money in his hands. (MILLER and FINCH, JJ., dissenting.)
Baucus v. Stover. 1

2. *It seems*, however, that the liability

of the executor is not in all respects the same as if he had actually received so much money; if wholly unable to pay in pursuance of an order or decree of the surrogate, because of insolvency, he cannot be attached and punished for contempt, nor would he be guilty of embezzlement. *Id.*

3. *It seems* also to be proper for a surrogate, in a decree which charges an executor with a debt due from him, to specify the charge thus made separately, so as to protect his rights. (Code of Civil Procedure, § 2545.) *Id.*

4. As to whether, where an executor has given security, his sureties will be held responsible for his debt as for so much money received, *quære.* *Id.*

5. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity, although no express trust be created by the will. *Wager v. Wager.* 161

6. Any person claiming an interest in the personalty, either as legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. *Id.*

7. *It seems*, that where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. *Id.*

8. The will of L., after giving various legacies, contained a clause authorizing his executors to sell all of his real estate, except his homestead farm, at such times and prices as to them should seem best for the interest of the estate, and after

carrying out the foregoing provisions to invest the balance of the estate in their hands in bonds and mortgages or in State stocks. One-half of such balance the testator gave to his daughter L, to be paid to her when she arrived of age; in case of her death, before the testator's wife, without lawful issue, the same to be paid to the wife. The other half he gave to his wife, to be paid to her ten years after his decease. In case of her death before the daughter, said one-half to be paid to the daughter. The homestead farm was devised to the wife for life. The executors received the rents and profits of the real estate. In an action for an accounting, *held*, that by said clause there was a conversion of the testator's real estate, with the exception specified, into personalty, as of the time of his death, and a gift of the converted fund together with the intermediate income to the wife and daughter with cross-remainders; and that the rents and profits received by the executors, and the proceeds of sales were properly brought into the accounting. *Lent v. Howard.* 169

9. The testator left five farms, including the homestead farm, and several houses and lots in the village of L. R. B., one of the executors, who lived several miles from L. R., at the request of the other executors, including the widow, removed to that village, took charge of all the real estate and continued in charge thereof, except two farms sold, working upon, managing and improving it for nearly fifteen years. The gross rents and profits were entered in the executors' accounts, and also the disbursements. The will gave to the executors \$1,000 in addition to their commissions. The referee found that the services of B. exceeded in value his commissions and the sum so given. *Held*, that B. was entitled to be allowed out of said gross rents and profits, in the nature of a charge thereon, a suitable compensation for his services; that the rule prohibiting an executor from charging more than the statutory commissions for his per-

sonal services in the discharge of the duties of his trust did not apply, as the services so rendered were no part of his executorial duties. *Id.*

10. B. received a sum of money on the exchange of a house and lot for a farm. *Held*, that in the absence of evidence that the exchange was made with the knowledge of his co-executor, H., or that the money ever came to the hands or under the control of the latter, he was not chargeable with the sum so received. *Id.*

11. The provision of the Revised Statutes, prohibiting an executor or administrator from retaining any part of the property of the decedent, "in satisfaction of his own debt or claim until it shall have been proved to or allowed by the surrogate" (2 R. S. 88, § 33), gives to the surrogate jurisdiction to pass upon and settle claims held by the executor or administrator in a representative capacity against the estate, as well as one held by him individually. *Neilley v. Neilley.* 352

12. Accordingly *held* that a surrogate, on settlement of the accounts of an administrator, had jurisdiction to pass upon and settle a claim against the estate held by him as the administrator of another estate, and that a decree of the surrogate disallowing said claim was a bar to an action to recover the same. *Id.*

13. Also that the fact that another was joined as administrator of one estate while he was sole administrator of the other was immaterial. *Id.*

14. The provision of the act of 1867 in reference to the authority and jurisdiction of surrogates (§ 2, chap. 782, Laws of 1867), which provides that a married woman shall be capable of acting as an administratrix and of receiving letters as such, the same as if unmarried, did not repeal the provision of the Revised Statutes (2 R. S. 74, § 28), giving a preference

in the granting of administration to unmarried over married women of equal degree of kindred. *In re Curser*. 401

15. The said act frees the married woman from pre-existing disabilities and so can have effect without disturbing the statutory order of appointment, and the two enactments are not necessarily inconsistent. *Id.*

16. Accordingly *held* where a surrogate issued letters of administration to one of two sisters, who was unmarried, without notice to the other, who was married, that the provision of the Code of Civil Procedure (§ 2662) requiring notice to every person having a prior or equal right did not apply, and that the appointment was valid. *Id.*

FACTOR.

1. Defendants, who were doing business in New York, contracted with one F. to sell him a quantity of sugar to be sent from St. Vincent, and to be "May-June shipment." The purchase-money to be paid at the port of departure. F. thereupon applied to plaintiffs for, and received from them, a letter of credit to their correspondents in London, which, by its terms, expired unless used before June 30, and required a May or June shipment, and bills of lading to plaintiffs' order; this was delivered by F. to defendants; at defendants' request a credit by telegram was substituted, the form and language of which was dictated and proposed by defendants. It contained no prohibition as to use later than June. No change, however, was made in the original contract. No shipment of sugar was made until July, when a cargo was shipped, the bills of lading being made to plaintiffs, and the credit was used therefor. On arrival of the sugars at New York, F. refused to receive them, because not shipped in compliance with the contract. Plaintiffs thereupon notified defendants that they could not receive them for F. and offered to surrender

them upon payment of the advances. Upon their refusal to take them, and after due notice, plaintiffs sold the sugars. In an action to recover the balance of the advances after application of the proceeds of sale, *held*, that F. was not bound to accept sugars shipped in July; that neither defendants nor their representatives at St. Vincent acquired a right to use credit after June 30, although the form of the telegraphic credit enabled them to do so; that in substance and effect defendants took plaintiffs' money as a forced loan or advance upon the consignment of the sugars to be sold on commission on their account; that plaintiffs, therefore, were entitled to recover, and a nonsuit was error. *Welsh v. Gessler*. 540

FINDINGS OF LAW AND FACT.

Where a referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law. *Bonnell v. Griswold*. 123

FORECLOSURE.

1. The provisions of the Railroad Acts (§ 1, chap. 282, Laws of 1854; § 1, chap. 469, Laws of 1873; § 1, chap. 710, Laws of 1873) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad corporation, to organize a new corporation for the purposes of the transfer, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case where there is no such existing corporation. *Peoples v. B'klyn F. & C. I. R. Co.* 75
2. After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage which was recorded; thereafter

an attachment was issued in said action which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged unless the United States consented to appear and submit to the jurisdiction of the State court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability, and directing plaintiff to satisfy the mortgage, upon payment into court of the amount due, with costs; with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action, on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff. *Held*, that the order was proper. *Johnston v. Stimmel*. 117

8. Plaintiff claimed that as his action was against defendants upon whom the attachment had not been served, he was entitled to proceed against them. *Held* untenable; as the liability of the defendants was for the same debt, which was paid by the payment into court, leaving simply the question as to who was entitled to the fund to be determined, in which none of the former defendants were interested. *Id.*

— *When equities existing as between mortgagor and mortgagee cannot be availed of by former in action to foreclose, brought by assignee of mortgage.*

See Riggs v. Purcell. (Mem.) 608

FOREIGN JUDGMENT.

— *The condition subsequent to action against stockholder of manu-*

facturing corporation, that judgment shall be recovered against the corporation, and execution returned unsatisfied, is not complied with by recovery of judgment in another State.

See R. M. N. Bank v. Bliss. 838

— *Effect of judgment of another State in establishing damages for negligence.*

See F. N. Bank v. F. N. Bank.

412

FORMER ADJUDICATION.

1. In an action brought by plaintiff as assignee in bankruptcy of A. to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest (U. S. R. S., §§ 5197, 5198), defendant interposed as a defense and proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff thereupon gave in evidence the record of a judgment in his favor in an action in which plaintiff as assignee sued defendant to recover a payment made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment, as, to annul the release, plaintiff was bound to show, not only that at its date defendant had reasonable cause to believe A. to be insolvent, but that he executed it in fraud of the act (U. S. R. S., §§ 5128, 5129, as amended by § 11, chap. 390, Laws of 1874); that proof that a prior payment made by A. to defendant was a fraudulent preference, known to be such, did not establish that a payment by defendant to A. of a debt due the latter was either fraudulent or known to be such. *Gelman v. Second National Bank.* 136

2. A surrogate, on settlement of the accounts of an administrator, has jurisdiction to pass upon and set-

tle a claim against the estate held by him as the administrator of another estate, and a decree of the surrogate disallowing such a claim is a bar to an action to recover the same. *Nealley v. Nealley*. 352

3. Defendant having received from plaintiff, for collection, a draft drawn by a Pennsylvania bank, on C. P. & Co., bankers in N. Y., delivered the draft to the drawees on receipt of their check for the amount; this was not presented for payment until the next day, when payment was refused, C. P. & Co. having failed on that day. Defendant thereupon returned the check to C. P. & Co., and received back the draft, demanded payment, caused the same to be protested for non-payment, and the next day served notice of protest upon the drawer. In an action to recover damages for alleged negligence, for the purpose of showing damage to the full amount of the draft, plaintiff offered in evidence a judgment record in an action brought by it in a Pennsylvania court against the drawer, whereby it was adjudged that the acceptance of the check and omission to make due presentment constituted as between the drawer, the payee and defendant a payment and discharged the drawer's liability. *Held*, that the record was competent evidence and conclusively established plaintiff's damages to be the full amount of the draft. *First Nat. Bk. v. Fourth Nat. Bk.* 412

FRAUD.

1. Prior to March 27, 1875, plaintiffs, who were partners doing business at Rochester, had had extensive business transactions with defendants, who were commission merchants in New York, and the parties had been in the habit of exchanging credits. Plaintiffs had sent to defendants four notes to take up other paper about maturing, which notes defendants had negotiated and used. On that day defendant S. wrote to plaintiffs, stating in substance that they had not used said notes and had themselves paid the paper they were given to renew. And on April 2, 1875, said defendant wrote again asking for four other notes. These plaintiffs sent in reliance upon the statements that the other notes had not been used. Defendants received, and negotiated them, using the proceeds. Soon after defendants failed; petitions in bankruptcy were filed against them and they were discharged, being then indebted to plaintiffs on all their accounts and transactions about \$1,000 aside from the proceeds of the four notes, which having passed into the hands of *bona fide* holders, plaintiffs were obliged to pay. In an action to recover damages because of the false representation, *held*, that plaintiffs were entitled to recover; that the representation was material; that defendants H., although not participants in the fraud, were liable *civilliter* therefor as it was perpetrated by their copartner in the transaction of the partnership business; and that the discharge in bankruptcy was no defense. *Bradner v. Strang*. 299
2. Also *held*, that the state of the accounts between the parties at the time the last notes were sent was material only as bearing upon the *quantum* of damages. *Id.*
3. Also *held*, that plaintiffs were properly allowed to testify that they sent the last notes in reliance upon said representations; and that a refusal to permit the defendants H. to testify that they did not have any intention to defraud was not error; nor was a refusal to allow defendants to testify for what purpose the last four notes were obtained. *Id.*
4. On June 30, 1875, before the notes last sent became due, defendants rendered to the plaintiffs an account, in which the latter were credited with the proceeds of said notes, which account, although with knowledge of the fraud, they retained down to the commencement of this action. *Held*, that as the damage did not arise until afterward, when plaintiffs were

compelled to pay the notes, the fraud was not condoned or waived by the retention of the account, nor were plaintiffs barred thereby of their right to recover. *Id.*

5. Plaintiff B. testified, without objection, that a few months after the failure he was told by defendant S. that when he got his discharge he would have the ability and disposition to make an honorable settlement with plaintiffs. Defendants' counsel requested the court to charge the jury to disregard such evidence. The court made no mention of it in its charge. *Held*, that the evidence was immaterial and the refusal to grant the request was not error. *Id.*

6. *It seems* that if the evidence was regarded by defendants' counsel as prejudicial, it should have been objected to when offered. *Id.*

FRAUDULENT CONVEYANCES.

1. In an action by a firm creditor to reach lands purchased and paid for by S., a member of the firm, but conveyed to his wife with intent, as alleged, to defraud creditors, it appeared that such conveyance was made about four years prior to the contracting of the debt to plaintiff; that after payment for the lands, the price of which was \$10,000, S. had several thousand dollars' worth of individual property, and, so far as appeared, owed no individual debts; that the firm was entirely solvent and was doing a prosperous business. *Held*, that the evidence justified a finding that there was no fraud, and an affirmance of the validity of the conveyance. *Phoenix B'k v. Stafford.* 405

2. Where a debtor has conveyed real estate in fraud of his creditors, and at his request his grantee has given a mortgage thereon to secure a debt of the grantor which existed at the time of the conveyance, to a creditor ignorant of its fraudulent character, the mortgage comes within the exception in the statute of frauds (2 R. S. 137, § 5), protecting the rights of purchasers in

good faith and "for a valuable consideration," and although the conveyance be set aside in an action brought by other creditors, the mortgage cannot be affected. *Murphy v. Briggs.* 446

3. The pre-existing indebtedness constitutes a valuable consideration within the meaning of the statute. *Id.*

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GAS-LIGHT COMPANIES.

1. The provision of the act of 1880 providing "for raising taxes for the use of the State upon certain corporations," etc. (§ 8, chap. 542, Laws of 1880) which excepts from the operation of the act "manufacturing corporations carrying on manufacture within this State," is not limited to corporations organized under the General Manufacturing Act, but includes all corporations, under whatever law incorporated, whose chief and principal business is the manufacture and sale of artificial products. *Nassau Gas-light Co. v. City of Brooklyn.* 409

2. A corporation organized under the act authorizing the formation of gas-light companies (Chap. 87, Laws of 1848), and which is engaged in manufacturing and supplying illuminating gas, is a manufacturing corporation within the meaning of said provision. *Id.*

3. Accordingly *held*, that the provision of said act (§ 8), which exempts from other taxation all corporations liable to be taxed under the act, did not apply to a gas-light company. *Id.*

GENERAL TERM.

— *Power of General Term on appeal under chap. 444, Laws of 1876, from decision of board of audit.*

See Danolds v. State of New York. 36

— Upon reversal of judgment by General Term on ground of insufficiency of evidence, new trial should be ordered unless a recovery on such trial would be impossible.

See *Gawthrop v. Leary*. (Mem.) 622

HABEAS CORPUS.

1. Where the petition on application for a writ of *habeas corpus* to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument under and by virtue of which he detained the relator, but simply required a return of the cause of his imprisonment, *held*, that certified minutes of the court showing judgment and the sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant. *People, ex rel. Trainor, v. Baker*. 460
2. *It seems* that a warrant of commitment in such case is simply an authority and direction to the sheriff or other officer to take the prisoner to the penitentiary; he is not detained by virtue thereof, but by virtue of the judgment, and if the officer furnishes the keeper with a certified copy of the judgment, it is sufficient evidence of his authority, and he need not retain the *mittimus*. *Id.*
3. *It seems* also if the prisoner has been properly and legally sentenced to prison he cannot be released, because of a defect in the *mittimus*. When he is safely in the proper custody, there is no office for a *mittimus* to perform. *Id.*
4. Where the certified copy of the minutes of the court furnished the keeper imperfectly described the crime of which the prisoner was convicted, *held* that the keeper could, upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was; and so, that the sentence

was legal, and the detention authorized. *Id.*

5. *It seems* that this cannot be shown by parol evidence, but should be proved by the records. *Id.*
6. Where, however, the facts were shown by affidavit without objection, *held*, that the court was authorized to hold it sufficient and to act thereon. *Id.*
7. A certified copy of judgment described the offense of which the prisoner was convicted as "an assault and resisting an officer;" the sentence was imprisonment for one year and a fine of \$500, the prisoner to stand committed until payment, etc. *Held*, that this did not describe the crime of resisting the execution of process within the meaning of the statutory provision declaring that offense (§ 17, chap. 69, Laws of 1845), but simply showed a conviction for an assault and battery. *Id.*
8. But *held* that if the sentence was excessive, the sentence to imprisonment for one year was authorized and the balance only could be held void; that the prisoner, therefore, was not entitled to his discharge until the expiration of the year. *Id.*

HIGHWAYS.

1. The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway is not *per se* a nuisance. *People v. N. Y., N. H. & H. R. R. Co.* 266
2. Conceding the rule that, as to the traveling public, an excavation in a street made by consent of the municipal authorities is not *per se* unlawful, and a nuisance, and that the person making the same is only liable for the omission of proper care, such rule does not apply when the excavation causes injury to adjoining land by collecting surface water or diverting it from its proper channel, and thus throwing it upon such land. *Mairs v. Manhattan R. E. Ass'n.* 493

— *Liability of owner of carriage which when driven by his servant runs over one crossing the street.*

See Groth v. Washburn (Mem.) 615

HUSBAND AND WIFE.

See MARRIED WOMEN.

INJUNCTION.

1. Where there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color and general appearance of the packages may be material; but a party cannot appropriate an ordinary and usual form of package and fashion of label, and exclude others from its use, or the use of any thing resembling it; to sustain an action restraining such use there must be an imitation of something that can legally be appropriated as a trade-mark. *Morgan's Sons' Co. v. Troxell.* 292

2. An action cannot be maintained to restrain a defendant from selling his own goods in packages and with labels he has a legal right to use, and which do not infringe upon any trade-mark of the plaintiff, because of fraudulent representations and devices on the part of defendant to palm off his goods as those of the plaintiff. *Id.*

3. Plaintiff, at the request of E., laid a small main in the lands of the latter in front of a row of dwelling-houses, for the purpose of supplying them with gas. It was made large enough to supply another row of houses, which E. proposed to erect, and was connected with a large main running through a street. E. sold the houses and the owners contracted with defendant to supply their houses with gas. Whereupon defendant disconnected the small main from the large main in the street and connected it with its own main laid in the same street. *Held*, that an action to restrain defendant from so using said small main and to compel it to reconnect it with plaintiff's large main, was

maintainable; that the action of defendant was a trespass upon plaintiff's property, and the character of the injury was such that an injunction was proper. *Poughkeepsie G. Co. v. Citizens' Gas Co.* 498

INSOLVENT COMPANIES.

— *Compensation of receiver of insolvent life insurance company and as to mode of fixing the same.*

See Att'y-Gen'l v. N. Y. L. Ins. Co. 94

— *Liability of receiver of insolvent life insurance company for services rendered after his appointment by an attorney employed by the company.*

See Barnes v. Newcomb. 108

INSURANCE (FIRE).

1. Two policies of fire insurance contained a condition that the company would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied. *Held* error; as although the condition had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages. *Ellsworth v. Aetna Ins. Co.* 186

2. Defendant issued a policy of fire insurance, which limited the time for bringing an action upon it to a "term of twelve months next after the loss or damage shall occur." A loss was not payable under it until sixty days after the proofs required by it "shall have been received at the office of the company

in New York, and the loss shall have been satisfactorily ascertained and proved." In an action upon the policy, *held*, that the period of limitation prescribed did not commence to run until a loss became due and payable, and the right to bring an action had accrued; and so, that an action brought within twelve months after the expiration of sixty days from the time of the loss was not barred by the limitation. *Steen v. Nia. F. Ins. Co.* 315

3. The policy contained a condition that if the premises became vacant or unoccupied during the life of the policy, without the consent of the company indorsed thereon, it should become void. The insurance was upon a dwelling-house which was described in the policy as "occupied by a tenant for farm purposes." It became unoccupied, and that fact having been communicated to defendant's general agents, they, on the day the vacancy occurred, wrote in the policy after the words above quoted the following: "The dwelling-house being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to the policy." Vacancies also occurred after that during the life of the policy, and the house was vacant and unoccupied at the time of the fire, but whenever the house was unoccupied, it was in charge of a trusty person living near, who inspected and attended to it daily. *Held*, that the words so written in did not apply solely to the then existing vacancy, but worked a modification of the original contract; and that there was no forfeiture. *Id.*
4. It was proved that one of the general agents, when informed that the house was again vacant, declared "that this clause upon the policy would hold good if it (the house) was unoccupied." *Held*, that the evidence was competent and that defendant was bound by the construction so given. *Id.*
5. The policy contained a provision that "the use of general terms or any thing less than a distinct spe-

cific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed condition or restriction therein." *Held*, that the general agents, unless specially restricted, could dispense with the condition orally as well as by writing. *Id.*

6. The policy also contained a clause declaring that "in case of the creation of any lien, or the levy of an execution" upon "the subject insured," without the consent of the company indorsed thereon, the insurance should cease. The premises upon which was the building insured were sold on execution issued upon a judgment recovered against the insured after the issuing of the policy, they were purchased by plaintiff, and on that day defendant, by its said general agents, with notice of the judgment, execution and sale, gave consent in writing to an assignment of the policy to plaintiff, and it was so assigned. *Held*, that by the consent to the assignment, the policy became in effect a new contract between the parties unaffected by the forfeiture. *Id.*
7. The rule that where a mortgagor has covenanted in his mortgage to keep the buildings upon the mortgaged premises insured for the benefit of the mortgagee, any insurance effected in the name or for the benefit of the former will be presumed to be in fulfillment of the covenant, and that the latter has an equitable lien upon the insurance money, does not apply when the policy itself provides for the payment of the loss to another incumbrancer. *Dunlop v. Avery.* 592
8. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Id.*
9. Where, therefore, after the execution of two mortgages upon the same premises, each of which con-

tained such a covenant, the mortgagor procured a policy, by the terms of which any loss was made payable to the junior mortgagee, to whom the policy was delivered, and who, until after a loss, had no actual notice or knowledge of the covenant in the senior mortgage, *held*, that as the legal title was in the junior mortgagee, the equities being equal, such title must prevail; and that he was entitled to the insurance moneys. *Id.*

10. Also *held*, that the fact that the provision in the policy making the loss payable to the junior mortgagee was inserted at his request or by his procurement did not, in the absence of any proof of fraud, affect his rights. *Id.*

11. *It seems* that even had it appeared that the junior mortgagee had notice of the insurance clause in the senior mortgage, in the absence of notice to him that it had not been performed, his rights would not have been affected. *Id.*

INSURANCE (LIFE).

1. The provision of the act of 1869 in reference to the appointment of receivers of insolvent life insurance companies, which authorizes the superintendent of the insurance department to fix the compensation of such receivers (§ 13, chap. 902, Laws of 1869), does not make the decision of that officer conclusive; but upon the presentation of the accounts of a receiver to the court for settlement, the jurisdiction of the superintendent and the regularity of its exercise are before the court, and may be determined by it. *Att'y-Gen'l v. N. A. Life Ins. Co.* 94

2. The said provision confers authority to fix compensation for services rendered, not a rate of compensation for future services. *Id.*

8. Parties interested in the fund are also entitled to notice and an opportunity to be heard. *Id.*

4. Where, therefore, the superintend-

ent, at the request of a receiver, made before his services had approached completion, and upon an estimate of the assets, less than one-half of the amount upon which the receiver claimed compensation, fixed the rate of allowance at five per cent without notice to any one interested in said assets, *held*, that the order was premature; and that an order made upon settlement of the receiver's account directing a reconsideration by the superintendent of his order was proper. *Id.*

5. The proceeds of the securities deposited with the superintendent, as a special fund to secure registered policies, are assets in the hands of the receiver, and he is entitled to commissions thereon. *Id.*

6. Premium notes and loans made on policies are not assets upon which the receiver is entitled to commissions; they constitute merely offsets against the liability of the company. *Id.*

7. Where a receiver had advanced money to pay taxes upon lands covered by mortgages in the hands of the superintendent, then being foreclosed, which advances were repaid from the proceeds of the foreclosure, *held*, that the receiver was not entitled to commissions upon the sum so refunded. *Id.*

8. The special fund in the hands of the superintendent is properly chargeable with its proportionate share of the expenses of the trust. *Id.*

9. The receiver has no authority without the direction or consent of the court to invest the moneys in his hands; in the absence of directions it is his duty simply to keep and protect the trust fund, and hold it ready for distribution. *Id.*

10. Where, however, a receiver without authority from the court, but acting in entire good faith, placed the fund in the hands of brokers to be loaned on call, and charged himself with the amounts received for interest, it appearing that no part of the fund was lost,

and that the parties interested therein were not injured, but were probably benefited, *held*, that an order charging the receiver with interest beyond the amount received was error. *Id.*

11. An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attorney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability. *Barnes v. Newcomb.* 108

12. The A. M. Life Insurance Co., having been served with an order to show cause why a receiver should not be appointed, retained plaintiff to oppose, which he did. The application was granted. Plaintiff advised, and at the request of the officers took an appeal to the General Term and to the Court of Appeals; the order was affirmed. Afterward without any specific instructions, but with the knowledge and assent of the officers plaintiff opposed the confirmation of the report of the actuary. In an action to recover for his services plaintiff testified that he rendered such services under the original general retainer. *Held*, that there was no entire contract, at the time of the original retainer, established, binding the company and its assets for its performance, so as to create a liability on the part of the receiver, payable out of the funds, for services rendered after his appointment; and that plaintiff was only entitled to recover for services rendered before such appointment. *Id.*

13. *It seems* that where the officers of a company believe it to be insolvent, and have reasonable grounds for such belief, it is their duty to oppose such an application, and that the reasonable expenses incurred should be allowed to them. *Id.*

14. It is competent for the court administering the fund, if there is

just ground and probable cause for appealing from the order appointing a receiver, to allow a reasonable sum for the expenses. *Id.*

15. This, however, is not an absolute right, enforceable by action, but is entirely in the discretion of that court and to be exercised in such proceeding. *Id.*

INSURANCE (MARINE).

1. Each of the defendants issued to plaintiff a policy of marine insurance insuring its steamship M. against "all perils of the sea and navigation usually taken by marine underwriters, loss by fire excepted." The policies were in various sums amounting in all to \$75,000, which for the purposes of the insurance was declared to be the value of the vessel. She went ashore in a violent storm, and as the efforts of the officers and crew were ineffectual to get her off, she was in danger of becoming a total wreck. Plaintiff thereupon, the insurers having consented that it should use every effort to save her, employed a wrecking company by whose aid she was set afloat and taken to New York, where she was repaired. The repairs which amounted to \$46,000, were paid for by the insurers. Plaintiff paid the bill of the wrecking company and other expenses incurred in getting the vessel afloat, amounting to \$21,840. In an action to recover the amount so paid, *held*, that the necessary expenditures so incurred were covered by the policies equally with those incurred for repairs. *Prov. & S. S. Co. v. Phoenix Ins. Co.* 559

2. *It seems* that defendant would have been so liable had they not given their assent. *Id.*

3. A general average was made in which the value of the steamer was stated at \$275,000. It was claimed by defendants that if liable at all, they were only liable for such proportion of the \$21,840 as the agreed value of the steamer, \$75,000, bears to its value stated as aforesaid for general average.

Held untenable; that the value as agreed upon for the purposes of insurance was conclusive between the parties, and within the limit of the sum insured plaintiff was entitled to full indemnity for all losses occasioned by the perils insured against; that therefore the items in question could not be considered the subject of general average, but should be deemed to have been incurred for the benefit of the insurer only, and as the whole amount thereof, together with the expenses for repairs, was less than the sum insured, plaintiff was entitled to recover the whole. *Id.*

INTEREST.

— *As to amount of allowance of interest as damages after going into effect of act (Chap. 588, Laws of 1879) fixing rate of interest at six per cent. See F. N. Bank v. F. N. Bank. 412*

— *Interest properly allowed as item of damages in action of trespass. See Mairs v. M. R. E. Ass'n. 498*

INTERPLEADER.

— *When proper as between conflicting claimants to deposits in savings bank. See Mulcahey v. E. I. S. Bank. 435*

JUDGMENT.

1. Where a judgment by default, of a court of general jurisdiction, recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction or affect the validity of the judgment. *Maples v. Mackey. 146*
2. All intendments are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown. *Id.*
3. *It seems* that upon motion made to vacate a judgment because of in-

formality of the proof of service of the summons, the informality may be cured by amendment. *Id.*

4. The statute of limitations was not a defense to a proceeding under the Code of Procedure (§ 375), to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, unless such defense existed at the time the action was commenced. The action was commenced by service of summons on the joint contractor (§ 99), and the proceeding was not a new action but a proceeding at the foot of the judgment. *Id.*

5. The provision of said Code (§ 379), giving to the one sought to be charged by such proceeding the right to set up any defense which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better. *Id.*

6. A certified copy of judgment described the offense of which the prisoner was convicted as "an assault and resisting an officer;" the sentence was imprisonment for one year and a fine of \$500, the prisoner to stand committed until payment, etc. *Held*, that this did not describe the crime of resisting the execution of process within the meaning of the statutory provision declaring that offense (§ 17, chap. 69, Laws of 1845), but simply showed a conviction for an assault and battery. *People, ex rel. Trainor, v. Baker 460*

7. The provision of the Code of Civil Procedure (§ 1440, as amended by § 2, chap. 681, Laws of 1881), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in

— Upon reversal of judgment by General Term on ground of insufficiency of evidence, new trial should be ordered unless a recovery on such trial would be impossible.

See *Gawthrop v. Leary*. (Mem.) 622

HABEAS CORPUS.

1. Where the petition on application for a writ of *habeas corpus* to inquire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument under and by virtue of which he detained the relator, but simply required a return of the cause of his imprisonment, *held*, that certified minutes of the court showing judgment and the sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant. *People, ex rel. Trainor, v. Baker*. 460
2. *It seems* that a warrant of commitment in such case is simply an authority and direction to the sheriff or other officer to take the prisoner to the penitentiary; he is not detained by virtue thereof, but by virtue of the judgment, and if the officer furnishes the keeper with a certified copy of the judgment, it is sufficient evidence of his authority, and he need not retain the *mittimus*. *Id.*
3. *It seems* also if the prisoner has been properly and legally sentenced to prison he cannot be released, because of a defect in the *mittimus*. When he is safely in the proper custody, there is no office for a *mittimus* to perform. *Id.*
4. Where the certified copy of the minutes of the court furnished the keeper imperfectly described the crime of which the prisoner was convicted, *held* that the keeper could, upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was; and so, that the sentence

was legal, and the detention authorized. *Id.*

5. *It seems* that this cannot be shown by parol evidence, but should be proved by the records. *Id.*
6. Where, however, the facts were shown by affidavit without objection, *held*, that the court was authorized to hold it sufficient and to act thereon. *Id.*
7. A certified copy of judgment described the offense of which the prisoner was convicted as "an assault and resisting an officer;" the sentence was imprisonment for one year and a fine of \$500, the prisoner to stand committed until payment, etc. *Held*, that this did not describe the crime of resisting the execution of process within the meaning of the statutory provision declaring that offense (§ 17, chap. 69, Laws of 1845), but simply showed a conviction for an assault and battery. *Id.*
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2. Defendant issued a policy of fire insurance, which limited the time for bringing an action upon it to a "term of twelve months next after the loss or damage shall occur." A loss was not payable under it until sixty days after the proofs required by it "shall have been received at the office of the company

the corporation, and an execution has been issued thereon and returned unsatisfied. *Handy v. Draper*. 334

5. The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of execution against the corporation. *Id.*

6. One H. executed and delivered to plaintiff a non-negotiable note, made payable on demand; upon the back of which the defendant had written his name. In an action thereon *held*, that defendant did not, in a commercial sense, become an indorser, but could be treated by plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand; that the statute of limitations then began to run in his favor, and as the action was commenced more than six years after date of note, it was barred by said statute. *McMullen v. Rafferty*. 456

7. Also *held*, that payments of interest by H., although with the knowledge of defendant, did not prevent the running of the statute; to have that effect they must have been made by him, or for him, by his authorized agent. *Id.*

MANUFACTURING CORPORATIONS.

1. Where, in an action against the trustees of a manufacturing corporation to enforce the liability imposed by the Manufacturing Act (§ 15, chap. 40, Laws of 1848), for the making of a false report, the sole falsity of the report alleged is in a statement that the capital stock has been paid up in full, without stating that all or a portion was paid for in property, as is required by the act of 1853 (Chap. 333, Laws of 1853); when such is the case, to sustain the action proof is necessary of some fact or circumstance indicating bad faith, a willful or fraudulent purpose on the part of defendants;

the penalty follows an actual, not a constructive falsehood. *Bonnell v. Grinbold*. 122

2. A creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) cannot maintain an action against a stockholder to enforce the liability to creditors imposed by said act (§ 10), until he has obtained a judgment upon his claim against the corporation, and an execution has been issued thereon and returned unsatisfied. *Handy v. Draper*. 334

3. The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of execution against the corporation. *Id.*

4. *It seems* that under said act the conditions of enforcing such liability are: *First*. The debt must be one payable within a year from the time it was contracted. *Second*. Suit against the corporation must have been brought within a year after the debt became due. *Third*. Execution against the company must have been returned unsatisfied. *Fourth*. Suits against persons who have ceased to be stockholders must be brought within two years thereafter. *Id.*

5. Defendant's liability in such an action is limited to the amount of his stock with interest from the time of the commencement of the action. *Id.*

6. Accordingly *held*, that the allowance of interest from the date of the recovery of judgment against the corporation was error. *Id.*

7. Under the provision of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), requiring as a condition precedent to the bringing of an action against a stockholder of a corporation organized under that act, to enforce his liability to a creditor of the corporation, imposed by the act (§ 10), that judgment shall be recovered against the corporation, and execution issued and returned unsatis-

fied, a proceeding *in rem* affecting only property of the corporation attached, and execution against that property is not a compliance with the condition. *R. M. Nat. B'k v. Bliss.* 338

8. The recovery of a judgment and issuing of execution in another State is not a compliance with said condition; it requires a judgment in and execution issued out of a court of this State. *Id.*

9. The provision of the act of 1880 providing "for raising taxes for the use of the State upon certain corporations," etc. (§ 3, chap. 542, Laws of 1880) which excepts from the operation of the act "manufacturing corporations carrying on manufacture within this State," is not limited to corporations organized under the General Manufacturing Act, but includes all corporations, under whatever law incorporated, whose chief and principal business is the manufacture and sale of artificial products. *Nassau G. L. Co. v. City of B'klyn.* 409

10. A corporation organized under the act authorizing the formation of gas-light companies (Chap. 37, Laws of 1848), and which is engaged in manufacturing and supplying illuminating gas, is a manufacturing corporation within the meaning of said provision. *Id.*

11. Accordingly *held*, that the provision of said act (§ 8), which exempts from other taxation all corporations liable to be taxed under the act did not apply to a gas-light company. *Id.*

MARRIED WOMEN.

1. In an action by plaintiff, a married woman, to recover the amount of certain deposits, she proved that she indorsed and delivered to her husband two checks belonging to her, and payable to her order, for the purpose of having the same deposited, in her name, with the defendant. She then produced a bank-book in the usual form, in which the amount of the checks

was credited to her as depositor. Defendant offered to show in substance that at the time of the first deposit it was orally agreed between plaintiff's husband and defendant, that the deposit should be made to defendant's credit, on condition that the same might be withdrawn by the husband on check drawn by him in plaintiff's name; that the second deposit was also made under a similar agreement, and that the deposits were subsequently so withdrawn. This was objected to and excluded. *Held* no error; that the request of the husband to have the deposit made in the name and to the credit of plaintiff, and a pass-book issued to her, taken in connection with the checks made payable to her, sufficiently disclosed the agency of the husband; that authority to sign his wife's name to future checks could not be inferred from the fact of his making the deposits; and defendant could not prove an arrangement with him hostile to her interests and beyond the apparent scope of the agency, without proof of actual authority from her. *Bates v. First Nat. Bk.* 286

2. The provision of the act of 1867 in reference to the authority and jurisdiction of surrogates (§ 2, chap. 782, Laws of 1867), which provides that a married woman shall be capable of acting as an administratrix and of receiving letters as such the same as if unmarried, did not repeal the provision of the Revised Statutes (2 R. S. 74, § 28), giving a preference in the granting of administration to unmarried over married women of equal degree of kindred. *In re Curser.* 401

3. The said act frees the married woman from pre-existing disabilities and so can have effect without disturbing the statutory order of appointment, and the two enactments are not necessarily inconsistent. *Id.*

4. Accordingly *held* where a surrogate issued letters of administration to one of two sisters who was unmarried, without notice to the

other, who was married, that the provision of the Code of Civil Procedure (§ 2662) requiring notice to every person having a prior or equal right did not apply, and that the appointment was valid. *Id.*

MASTER AND SERVANT.

1. In the absence of notice to the contrary a servant has a right to assume the master will perform the duty imposed upon him, of furnishing proper, adequate and perfect implements and appliances necessary for the performance of any duty required of the servant. *Kain v. Smith.* 375
2. An employer does not undertake, absolutely, with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care; and when injury to an employe results from a defect in the implements, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith.* 470
3. Defendant, J. T. S., a painter, contracted to paint the inside of the dome of a court-house. Having no experience in building scaffolds, or knowledge of that business, he made a contract with defendant J. S., an experienced scaffold-builder, to erect the necessary scaffolding, which was to be first-class. Through the negligence of J. S., the scaffold was defectively constructed, and, in consequence, while D., plaintiff's intestate, who was in the employ of J. T. S., was at work upon the scaffold, it gave way, and D. received injuries causing his death. In an action to recover damages, it did not appear that J. T. S. knew, or had reason to know, of any defect in the scaffold. *Held*, that J. S. was not the agent, or servant, of J. T. S., but an independent contractor, for whose acts, or omissions, the latter was not liable; that it was not negligence for him to rely upon the judgment of J. S. as to the sufficiency of the scaffold, and the propriety of the mode of construction; and that, therefore, J. T. S. was not liable. But *held* (EARL, J., dissenting) that J. S. was liable, as, although there was no privity of contract between him and D., he had contracted to build a structure for the workmen of J. T. S., any defect wherein, which would cause it to give way, would naturally result in injury to said workmen, and he owed them a duty to use proper diligence, independent of his contract. *Id.*
4. Where upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, i. e., the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers.* 527
5. *It seems* that if the trial is before the expiration of the term, plaintiff is entitled to recover such actual damage as the evidence shows he has sustained up to the time of trial, and if at that time the loss is still only probable, the recovery should be for nominal damages only. *Id.*

MORTGAGE.

1. The rule that where a mortgagor has covenanted in his mortgage to keep the buildings upon the mortgaged premises insured for the benefit of the mortgagee, any insurance effected in the name or for the benefit of the former will be presumed to be in fulfillment of the covenant, and that the latter has an equitable lien upon the insurance money, does not apply when the policy itself provides for the

payment of the loss to another incumbrancer. *Dunlop v. Avery.* 592

2. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Id.*

3. Such a covenant is not one running with the land, but is entirely personal in its character. *Id.*

4. Where, therefore, after the execution of two mortgages upon the same premises, each of which contained such a covenant, the mortgagor procured a policy, by the terms of which any loss was made payable to the junior mortgagee, to whom the policy was delivered, and who, until after a loss, had no actual notice or knowledge of the covenant in the senior mortgage, *held*, that as the legal title was in the junior mortgagee, the equities being equal, such title must prevail; and that he was entitled to the insurance moneys. *Id.*

5. Also *held*, that the fact that the provision in the policy making the loss payable to the junior mortgagee was inserted at his request or by his procurement did not, in the absence of any proof of fraud, affect his rights. *Id.*

6. *It seems* that even had it appeared that the junior mortgagee had notice of the insurance clause in the senior mortgage, in the absence of notice to him that it had not been performed, his rights would not have been affected. *Id.*

— *Where executor sells lands without authority subject to a mortgage which the purchaser pays, and ejectment is brought by heir, the judgment should be without prejudice to purchaser's lien for amount so paid or to his right to be subrogated to rights of mortgagee.*

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mortgage, mortgagor cannot interpose a defense, legal or equitable, good as against the mortgagee.

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MOTIONS AND ORDERS.

1. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. *Hull v. Brooks.* 83

2. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein, *held*, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. *Id.*

3. After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action, which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged, unless the United States consented to appear and submit to the jurisdiction of the State court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability, and directing plaintiff to satisfy the mortgage, upon payment into court of the amount due, with

an action wherein relief is sought against a fraudulent act of such grantee. *McIntyre v. Sanford*. 634

— Upon reversal of judgment by General Term on ground of insufficiency of evidence new trial should be ordered unless a recovery on such trial would be impossible.

See *Gawthrop v. Leary*. (Mem.) 622

JUDICIAL SALES.

1. The provision of the Code of Civil Procedure (§ 1440, as amended by § 2, chap. 681, Laws of 1881), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee. *McIntyre v. Sanford*. 634

JURISDICTION.

1. The United States, by voluntarily appearing in a State court as a claimant to a fund therein, subjects itself to the jurisdiction of the court, and will be bound by its decision. *Johnston v. Stimmel*. 117
2. Where a judgment by default, of a court of general jurisdiction, recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction or affect the validity of the judgment. *Maples v. Mackey*. 146
3. All intendments are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown. *Id.*
4. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to guide

the action of a trustee. *Wager v. Wager*. 161

5. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity, although no express trust be created by the will. *Id.*
6. It seems, that where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. *Id.*
7. An heir at law or devisee, who claims a mere legal estate in real property, when there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. *Id.*
8. Where, however, the court has obtained jurisdiction for the purpose of establishing the equitable rights of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy. *Id.*
9. A Surrogate's Court can only exercise the powers prescribed by statute, and such incidental powers as are requisite to the exercise of the powers expressly given, or to the attainment of justice in the cases to which its jurisdiction extends. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, either given expressly or by implication, the whole proceedings are void. *Riggs v. Cragg*. 479
10. In proceedings under the statute (2 R. S. 220, § 1), for a special accounting of an executor, at the instance of a legatee, to enforce the payment of a legacy, the surrogate has only jurisdiction to decree payment where the legacy is undisputed. When upon such an application the surrogate can see that other persons may claim, and a real question is presented as to the right of one of several persons

to the legacy or fund, he may not proceed to a determination without the presence of all the parties who may be affected by the adjudication; these can only be brought in upon a final accounting, and only in that proceeding has the surrogate jurisdiction to settle and adjust conflicting rights and interests. *Id.*

11. *It seems that a surrogate has jurisdiction to pass upon the construction of a will, where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made. Id.*

— *Surrogate on settlement of administrator's accounts has jurisdiction to pass upon a claim against an estate held by him as administrator of another estate.*

See Neilley v. Neilley. 352

— *When question as to jurisdiction of County Court is one of fact and so not reviewable here.*

See Coe v. Raymond. (Mem.) 612

LEGACY.

See WILLS.

LIEN.

An agreement, either oral or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment. *Williams v. Ingersoll. 508*

— *When attorneys can claim lien for services upon an award in favor of client.*

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LIMITATIONS OF ACTIONS.

1. The statute of limitations was not a defense to a proceeding under the Code of Procedure (§ 375), to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, unless such defense existed at the time the action was commenced. The action was commenced by service of summons on the joint contractor (§ 99), and the proceeding was not a new action but a proceeding at the foot of the judgment. *Maples v. Mackey. 146*

2. The provision of said Code (§ 379), giving to the one sought to be charged by such proceeding the right to set up any defense which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better. *Id.*

3. Defendant issued a policy of fire insurance, which limited the time for bringing an action upon it to a "term of twelve months next after the loss or damage shall occur." A loss was not payable under it until sixty days after the proofs required by it "shall have been received at the office of the company in New York, and the loss shall have been satisfactorily ascertained and proved." In an action upon the policy, *held*, that the period of limitation prescribed did not commence to run until a loss became due and payable, and the right to bring an action had accrued; and so, that an action brought within twelve months after the expiration of sixty days from the time of the loss was not barred by the limitation. *Steen v. Nia. F. Ins. Co. 315*

4. A creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) cannot maintain an action against a stockholder to enforce the liability to creditors imposed by said act (§ 10), until he has obtained a judgment upon his claim against

the corporation, and an execution has been issued thereon and returned unsatisfied. *Handy v. Draper*. 834

5. The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of execution against the corporation. *Id.*

6. One H. executed and delivered to plaintiff a non-negotiable note, made payable on demand; upon the back of which the defendant had written his name. In an action thereon *held*, that defendant did not, in a commercial sense, become an indorser, but could be treated by plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand; that the statute of limitations then began to run in his favor, and as the action was commenced more than six years after date of note, it was barred by said statute. *McMullen v. Rafferty*. 456

7. Also *held*, that payments of interest by H., although with the knowledge of defendant, did not prevent the running of the statute; to have that effect they must have been made by him, or for him, by his authorized agent. *Id.*

MANUFACTURING CORPORATIONS.

1. Where, in an action against the trustees of a manufacturing corporation to enforce the liability imposed by the Manufacturing Act (§ 15, chap. 40, Laws of 1848), for the making of a false report, the sole falsity of the report alleged is in a statement that the capital stock has been paid up in full, without stating that all or a portion was paid for in property, as is required by the act of 1853 (Chap. 333, Laws of 1853); when such is the case, to sustain the action proof is necessary of some fact or circumstance indicating bad faith, a willful or fraudulent purpose on the part of defendants;

the penalty follows an actual, not a constructive falsehood. *Bonnell v. Griswold*. 122

2. A creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) cannot maintain an action against a stockholder to enforce the liability to creditors imposed by said act (§ 10), until he has obtained a judgment upon his claim against the corporation, and an execution has been issued thereon and returned unsatisfied. *Handy v. Draper*. 834

3. The statute of limitations, therefore, does not begin to run in favor of a stockholder until after the return of execution against the corporation. *Id.*

4. *It seems* that under said act the conditions of enforcing such liability are: *First*. The debt must be one payable within a year from the time it was contracted. *Second*. Suit against the corporation must have been brought within a year after the debt became due. *Third*. Execution against the company must have been returned unsatisfied. *Fourth*. Suits against persons who have ceased to be stockholders must be brought within two years thereafter. *Id.*

5. Defendant's liability in such an action is limited to the amount of his stock with interest from the time of the commencement of the action. *Id.*

6. Accordingly *held*, that the allowance of interest from the date of the recovery of judgment against the corporation was error. *Id.*

7. Under the provision of the General Manufacturing Act (§ 24, chap. 40, Laws of 1848), requiring as a condition precedent to the bringing of an action against a stockholder of a corporation organized under that act, to enforce his liability to a creditor of the corporation, imposed by the act (§ 10), that judgment shall be recovered against the corporation, and execution issued and returned unsatis-

fied, a proceeding *in rem* affecting only property of the corporation attached, and execution against that property is not a compliance with the condition. *R. M. Nat. B'k v. Bliss.* 338

8. The recovery of a judgment and issuing of execution in another State is not a compliance with said condition; it requires a judgment in and execution issued out of a court of this State. *Id.*

9. The provision of the act of 1880 providing "for raising taxes for the use of the State upon certain corporations," etc. (§ 3, chap. 542, Laws of 1880) which excepts from the operation of the act "manufacturing corporations carrying on manufacture within this State," is not limited to corporations organized under the General Manufacturing Act, but includes all corporations, under whatever law incorporated, whose chief and principal business is the manufacture and sale of artificial products. *Nassau G. L. Co. v. City of B'klyn.* 409

10. A corporation organized under the act authorizing the formation of gas-light companies (Chap. 37, Laws of 1848), and which is engaged in manufacturing and supplying illuminating gas, is a manufacturing corporation within the meaning of said provision. *Id.*

11. Accordingly *held*, that the provision of said act (§ 8), which exempts from other taxation all corporations liable to be taxed under the act did not apply to a gas-light company. *Id.*

MARRIED WOMEN.

1. In an action by plaintiff, a married woman, to recover the amount of certain deposits, she proved that she indorsed and delivered to her husband two checks belonging to her, and payable to her order, for the purpose of having the same deposited, in her name, with the defendant. She then produced a bank-book in the usual form, in which the amount of the checks

was credited to her as depositor. Defendant offered to show in substance that at the time of the first deposit it was orally agreed between plaintiff's husband and defendant, that the deposit should be made to defendant's credit, on condition that the same might be withdrawn by the husband on check drawn by him in plaintiff's name; that the second deposit was also made under a similar agreement, and that the deposits were subsequently so withdrawn. This was objected to and excluded. *Held* no error; that the request of the husband to have the deposit made in the name and to the credit of plaintiff, and a pass-book issued to her, taken in connection with the checks made payable to her, sufficiently disclosed the agency of the husband; that authority to sign his wife's name to future checks could not be inferred from the fact of his making the deposits; and defendant could not prove an arrangement with him hostile to her interests and beyond the apparent scope of the agency, without proof of actual authority from her. *Bates v. First Nat. Bk.* 286

2. The provision of the act of 1867 in reference to the authority and jurisdiction of surrogates (§ 2, chap. 782, Laws of 1867), which provides that a married woman shall be capable of acting as an administratrix and of receiving letters as such the same as if unmarried, did not repeal the provision of the Revised Statutes (2 R. S. 74, § 28), giving a preference in the granting of administration to unmarried over married women of equal degree of kindred. *In re Curser.* 401

3. The said act frees the married woman from pre-existing disabilities and so can have effect without disturbing the statutory order of appointment, and the two enactments are not necessarily inconsistent. *Id.*

4. Accordingly *held* where a surrogate issued letters of administration to one of two sisters who was unmarried, without notice to the

be kept closed at all times except when in actual use "by the occupant or occupants of the buildings having the use and control of the same;" where there are several occupants of a building, the duty is imposed upon the one whose use of the elevator or hoistway requires the opening, and whose disuse permits the close of the trap-doors; no one of them can be made liable for the neglect of another to perform such duty. *Harris v. Perry.* 308

5. The provisions of the act entitled "An act in relation to regulating and grading the Eighth avenue in the city of New York" (Chap. 593, Laws of 1870), which authorize the commissioners of public parks to change the grade of streets intersecting said avenue to conform to the grade thereof, are void, as the including them in the act renders it repugnant to the constitutional provision (State Const., art. 3, § 16) declaring that a local or private bill shall embrace but one subject, and that shall be expressed in the title. *In re Blodgett.* 392

6. Under the provision of the act of 1871 (§ 4, chap. 226, Laws of 1871), authorizing the commissioner of public parks of the city of New York "to fix and establish the grades of the streets," within a specified territory "where the same have not heretofore been fixed and established by law," not only were such grades excepted as had been fixed by legislative enactment, but also those lawfully established by ordinance of the common council. *In re Mut. L. Ins. Co.* 530

7. The provision does not authorize a change of grade, but deals only with streets whose grades have not been lawfully established. *Id.*

8. Where, however, it appeared, upon application to vacate an assessment, that the commissioner changed slightly the grade of a small section of a street, and that more than the increased cost of the improvement occasioned by the change was charged upon the city,

because in excess of one-half the valuation of the property benefited, so that if the extra cost of the illegal work had been, in the first instance, left out of the assessment, or should be deducted therefrom, the cost of work lawfully done would exceed the amount of the assessment. *Held*, that there was no substantial error, and that an order vacating the assessment was error. *Id.*

9. The sidewalks of the street were laid but four feet wide. The ordinance, in general terms, directed that the sidewalks be flagged, without specifying the width. It was passed a short time prior to the passage of the city charter of 1873 (Chap. 335 of the Laws of 1873), which repealed the provision of the charter of 1870 (§ 1, chap. 383, Laws of 1870) requiring all flagging to be laid "full width," i. e., twelve feet. It did not appear, however, that the contract for the work was made before such repeal. *Held*, that the objection was untenable; that the burden was upon the petitioner to show substantial error, and this he failed to do, as it was entirely possible that the work was in violation of no existing statute applicable to it when done. *Id.*

10. The scheme of sewer improvements in the city of New York contemplates that the whole expense should be borne by the property benefited. *In re Lowden.* 548

11. Engineers' and surveyors' fees are properly included in an assessment for such an improvement, as an item of the expenses, and although the mode of ascertaining may not give the exact cost of this item, if it approximates thereto and the charge does not appear to be in excess of the sum properly chargeable to the work, it is not a tenable objection to the assessment. *Id.*

12. Nor is it a valid objection that the engineers by whom the work was done were already in the employ of the city, under a salary which had been paid. *Id.*

13. When, therefore, an assessment for such a work included an item for engineers' and surveyors' fees, which was made under the supervision of the chief engineer of the bureau of sewers, and was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to the sewerage of the city done during the year, as would remunerate the city for the moneys paid for engineers' expenses; *held*, that in the absence of evidence that the share imposed upon the petitioner was enhanced, or that this item of expense could be arrived at in a way better or more just to him and the public, it was properly included. *Id.*

14. The statutes in relation to assessments for such improvements provide for sufficient notice and hearing to persons affected by an assessment to meet the constitutional requirements. *Id.*

15. Where the published notice required objections to an assessment to be presented to the "board of assessors," instead of to the chairman of that board as prescribed in the act of 1841 (§ 1, chap. 171, Laws of 1841), *held*, that the variance was immaterial, as the objections, if any were made, were for the board, not for its chairman alone, to consider. *Id.*

NOTICE.

Notice to debtor of assignment of debt not necessary to make assignment valid, only necessary to prevent subsequent bona fide payment by debtor. See Williams v. Ingersoll. 508

NUISANCE.

1. The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway is not *per se* a nuisance. *People v. N. Y., N. H. & H. R. R. 266*

2. The duty of restoration of "the highway as near as may be to its

former state, so as not to unnecessarily impair its usefulness," imposed by its charter (§ 5, chap. 195, Laws of 1846), upon the N. Y., N. H. & H. R. R. Co., does not absolutely require it, at such a crossing, to construct the bridge of the full width of the highway, the requirement is simply to so construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway. *Id.*

8. Upon the trial of an indictment against said corporation for alleged nuisance in constructing a bridge over its road for a highway, of less width than the highway, it appeared that the highway, when defendant's road was constructed, was owned by a turnpike company which, by its charter (Chap. 121, Laws of 1800), was required, where a bridge was necessary, to build it not less than sixteen feet wide. Defendant, prior to 1850, constructed its road across the highway below its surface, and built a bridge for the highway about sixteen feet wide; this was replaced by a new one in 1852 or 1853 about nineteen and one-half feet wide; both were approved by the turnpike company. In 1879, after the rights of said company in the highway had been extinguished, defendant built the bridge in question, which was twenty-four feet wide, with the roadway twenty-two and one-half feet in width, corresponding substantially with the width of the beaten track of the highway. The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance and defendant was guilty under the indictment; that the question was whether the bridge was so constructed "as not to impair the usefulness of the road and to interfere with the enjoyment or safety of the public." *Held* error. *Id.*

4. Conceding the rule that, as to the traveling public, an excavation in a street made by consent of the municipal authorities is not *per se* unlawful, and a nuisance, and that the person making the same is

other, who was married, that the provision of the Code of Civil Procedure (§ 2662) requiring notice to every person having a prior or equal right did not apply, and that the appointment was valid. *Id.*

MASTER AND SERVANT.

1. In the absence of notice to the contrary a servant has a right to assume the master will perform the duty imposed upon him, of furnishing proper, adequate and perfect implements and appliances necessary for the performance of any duty required of the servant. *Kain v. Smith.* 375
2. An employer does not undertake, absolutely, with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care; and when injury to an employe results from a defect in the implements, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith.* 470
3. Defendant, J. T. S., a painter, contracted to paint the inside of the dome of a court-house. Having no experience in building scaffolds, or knowledge of that business, he made a contract with defendant J. S., an experienced scaffold-builder, to erect the necessary scaffolding, which was to be first-class. Through the negligence of J. S., the scaffold was defectively constructed, and, in consequence, while D., plaintiff's intestate, who was in the employ of J. T. S., was at work upon the scaffold, it gave way, and D. received injuries causing his death. In an action to recover damages, it did not appear that J. T. S. knew, or had reason to know, of any defect in the scaffold. *Held*, that J. S. was not the agent, or servant, of J. T. S., but an independent contractor, for whose acts, or omissions, the latter was not liable; that it was not negligence for him to rely upon the judgment of J. S. as to the suffi-

ency of the scaffold, and the propriety of the mode of construction; and that, therefore, J. T. S. was not liable. But *held* (EARL, J., dissenting) that J. S. was liable, as, although there was no privity of contract between him and D., he had contracted to build a structure for the workmen of J. T. S., any defect wherein, which would cause it to give way, would naturally result in injury to said workmen, and he owed them a duty to use proper diligence, independent of his contract. *Id.*

4. Where upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, i. e., the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers.* 527
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2. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Id.*

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1. In the absence of notice to the contrary a servant has a right to assume the master will perform the duty imposed upon him, of furnishing proper, adequate and perfect implements and appliances necessary for the performance of any duty required of the servant. *Kain v. Smith.* 375
2. An employer does not undertake, absolutely, with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care; and when injury to an employe results from a defect in the implements, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith.* 470
3. Defendant, J. T. S., a painter, contracted to paint the inside of the dome of a court-house. Having no experience in building scaffolds, or knowledge of that business, he made a contract with defendant J. S., an experienced scaffold-builder, to erect the necessary scaffolding, which was to be first-class. Through the negligence of J. S., the scaffold was defectively constructed, and, in consequence, while D., plaintiff's intestate, who was in the employ of J. T. S., was at work upon the scaffold, it gave way, and D. received injuries causing his death. In an action to recover damages, it did not appear that J. T. S. knew, or had reason to know, of any defect in the scaffold. *Held*, that J. S. was not the agent, or servant, of J. T. S., but an independent contractor, for whose acts, or omissions, the latter was not liable; that it was not negligence for him to rely upon the judgment of J. S. as to the suffi-

ency of the scaffold, and the propriety of the mode of construction; and that, therefore, J. T. S. was not liable. But *held* (EARL, J., dissenting) that J. S. was liable, as, although there was no privity of contract between him and D., he had contracted to build a structure for the workmen of J. T. S., any defect wherein, which would cause it to give way, would naturally result in injury to said workmen, and he owed them a duty to use proper diligence, independent of his contract. *Id.*

4. Where upon breach of a contract of employment, by a wrongful discharge of the employe, an action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term, i. e., the difference between the compensation fixed by the contract for the service and what plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers.* 527
5. *It seems* that if the trial is before the expiration of the term, plaintiff is entitled to recover such actual damage as the evidence shows he has sustained up to the time of trial, and if at that time the loss is still only probable, the recovery should be for nominal damages only. *Id.*

MORTGAGE.

1. The rule that where a mortgagor has covenanted in his mortgage to keep the buildings upon the mortgaged premises insured for the benefit of the mortgagee, any insurance effected in the name or for the benefit of the former will be presumed to be in fulfillment of the covenant, and that the latter has an equitable lien upon the insurance money, does not apply when the policy itself provides for the

payment of the loss to another incumbrancer. *Dunlop v. Avery.* 592

2. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Id.*

3. Such a covenant is not one running with the land, but is entirely personal in its character. *Id.*

4. Where, therefore, after the execution of two mortgages upon the same premises, each of which contained such a covenant, the mortgagor procured a policy, by the terms of which any loss was made payable to the junior mortgagee, to whom the policy was delivered, and who, until after a loss, had no actual notice or knowledge of the covenant in the senior mortgage, *held*, that as the legal title was in the junior mortgagee, the equities being equal, such title must prevail; and that he was entitled to the insurance moneys. *Id.*

5. Also *held*, that the fact that the provision in the policy making the loss payable to the junior mortgagee was inserted at his request or by his procurement did not, in the absence of any proof of fraud, affect his rights. *Id.*

6. *It seems* that even had it appeared that the junior mortgagee had notice of the insurance clause in the senior mortgage, in the absence of notice to him that it had not been performed, his rights would not have been affected. *Id.*

— *Where executor sells lands without authority subject to a mortgage which the purchaser pays, and ejectment is brought by heir, the judgment should be without prejudice to purchaser's lien for amount so paid or to his right to be subrogated to rights of mortgagee.*

See Smith v. Robertson. 555

— *When, as against assignee of*
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mortgage, mortgagor cannot interpose a defense, legal or equitable, good as against the mortgagee.

See Riggs v. Purcell. (Mem.) 608

— *When equities existing as between mortgagor and mortgagee cannot be availed of by former in action to foreclose, brought by assignee of mortgage.*

See Riggs v. Purcell. (Mem.) 608

MOTIONS AND ORDERS.

1. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. *Hull v. Brooks.* 33

2. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein, *held*, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. *Id.*

3. After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action, which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged, unless the United States consented to appear and submit to the jurisdiction of the State court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability, and directing plaintiff to satisfy the mortgage, upon payment into court of the amount due, with

costs; with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action; on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff. *Held*, that the order was proper. *Johnston v. Stimmel*. 117

4. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim. *Held*, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. *Mairs v. Manhattan R. E. Ass'n*. 498

— *When payment by broker to sheriff of proceeds of sale of goods under order of court in supplementary proceedings against agent of owner, no defense to action by owner to recover such proceeds.*

See Wright v. Cabot. 570

MUNICIPAL CORPORATIONS.

- 1 Where, through culpable omission of duty upon the part of the municipal corporation, a city street has become obstructed, and in consequence a traveler upon the street is injured, it is no defense to an action against the municipality to recover damages that the accident happened upon Sunday, and that the person injured was, in traveling on that day, violating the statute relating to the "observance of Sunday." (1 R. S. 676, § 70.) *Platz v. City of Cohoes*. 219
2. A municipal corporation cannot delegate power to private individuals to be exercised for their own private benefit to do injury to the property of their neighbors, and relieve them from responsibility

from the damages, or reduce their liability to such as may result from want of proper care. *Mairs v. Manhattan R. E. Ass'n*. 498

*See BROOKLYN (CITY OF).
NEW YORK (CITY OF).*

NATIONAL BANKS.

1. A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may, under the Code of Civil Procedure (§ 682), move to vacate the attachment without being made a party to the action. *Nat. S. & L. Bk. v. Mech. Nat. Bk.* 440
2. Under the National Banking Act (U. S. R. S., § 5798), an attachment is prohibited and may not issue out of a State court against a National bank which is or is about to become insolvent. *Nat. S. & L. Bk. v. Mech. Nat. Bk.* 467

NEGLIGENCE.

1. When one injured by the wrongful act, neglect or default of another brings suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury, his personal representatives cannot maintain an action under the act of 1847 (Chap. 450, Laws of 1847). *Littlewood v. Mayor, etc.* 24
2. Where, through culpable omission of duty upon the part of the municipal corporation, a city street has become obstructed, and in consequence a traveler upon the street is injured, it is no defense to an action against the municipality to recover damages that the accident happened upon Sunday, and that the person injured was, in traveling on that day, violating the statute relating to the "observance of Sunday." (1 R. S. 676, § 70.) *Platz v. City of Cohoes*. 219
3. The courts may not add to the penalty imposed by that statute a forfeiture of the right to indemnity for an injury resulting from de-

fendant's negligence, and the violation of the statute cannot be regarded as the immediate cause of the injury. *Id.*

4. Under the provision of the act relating to buildings in the city of New York (§ 16, chap. 625, Laws of 1971, as amended by § 5, chap. 547, Laws of 1874), which provides that the opening of any elevator or hoistway in a building in said city shall be protected on each floor by railings and trap-doors, and that the trap-doors shall be kept closed at all times except when in actual use "by the occupant or occupants of the buildings having the use and control of the same;" where there are several occupants of a building, the duty is imposed upon the one whose use of the elevator or hoistway requires the opening, and whose disuse permits the close of the trap-doors; no one of them can be made liable for the neglect of another to perform such duty. *Harris v. Perry.* 308

5. Defendants leased all of a building in said city above the first floor, which with the basement and sub-cellar was leased to other tenants; the tenants had a common right to use a shipping-room in the basement, and an elevator or hoistway for goods, which was part of the building running from the sub-cellar up to the upper story and moved by power furnished by the owners of the building, and under the control of an engineer employed by them. Plaintiff went to the shipping-room to procure goods purchased of defendants, and finding no one there to deliver, went to the elevator to call through the opening overhead as he had done before with safety. The room was dark; the elevator was not in use at the time, but was up near the first floor. The trap-doors in the basement floor were open, and plaintiff fell through to the sub-cellar and was injured. In an action to recover damages it did not appear that defendants had used the elevator last, and only by a supposition of a clerk that they had used it that day. *Held*, that no negligence on

the part of defendants or liability under said statute was shown; and that a refusal to nonsuit was error. *Id.*

6. *It seems* that the question of contributory negligence on the part of the plaintiff was properly submitted to the jury. *Id.*

7. A shipping contract will not be construed as exempting the carrier from liability for his own negligence, unless the intent is so plainly and distinctly expressed as that it cannot be misunderstood by the shipper; it cannot be inferred from general words in the contract. *Nicholas v. N. Y. C. & H. R. R. R.* 370

8. Plaintiff shipped a quantity of fruit trees by defendant's road; the shipping contract, among a great number of special exemptions from liability on the part of the carrier, contained the following, for "damage occasioned by delays from any cause or from change of weather." The trees were lost by the negligent delay of defendant in the transportation. In an action to recover damages, *held*, that such a loss was not covered by the exemption, and that defendant was liable. *Id.*

9. Plaintiff was employed as a carpenter by defendant who was operating a railroad, he was directed to assist in loading car-wheels, which work was being done under the direction of a foreman. The car-wheels were in pairs, connected by an axle and standing on a track; and were loaded by an implement called a "jigger," one end of which was placed upon the tracks, and the other upon the platform of the car. It was composed of two side pieces, corresponding with the rails of the track, connected by cross-bars; the end upon the car was furnished with hooks to hold it in place. One side of the jigger was worn off so as to make it shorter than the other; the hooks were worn off and blunted so as not to hold firmly to the car, and the cross-bars were worn and loose. After two pairs of wheels were loaded, the others were run along

the track so as to give them a headway before striking the jigger; it was customary to load in this way. As the last pair was being loaded one end of the jigger slipped from the car, the wheels fell, struck and injured the plaintiff. Plaintiff had never before loaded car-wheels or seen them loaded, and did not know what a jigger was. Defendant's master-mechanic had, prior to the accident, been notified that the jigger was defective. In an action to recover damages, where these facts appeared, *held* (RAPALLO and EARL, JJ., dissenting), that the evidence tended to show defendant furnished an imperfect implement, and that the injury was occasioned thereby; and so that the question of negligence and contributory negligence should have been submitted to the jury, and a nonsuit was error. *Kain v. Smith.* 375

10. Defendant having received from plaintiff for collection, a draft drawn by a Pennsylvania bank, on C. P. & Co., bankers in N. Y., delivered the draft to the drawees on receipt of their check for the amount; this was not presented for payment until the next day, when payment was refused, C. P. & Co. having failed on that day. Defendant thereupon returned the check to C. P. & Co., and received back the draft, demanded payment, caused the same to be protested for non-payment and the next day served notice of protest upon the drawer. In an action to recover damages for alleged negligence, it was *held*, that defendant was liable, but that as the remedy against the drawer was preserved, defendant was only liable for the actual damages. (77 N. Y. 320.) *First Nat. B'k v. Fourth Nat. B'k.* 412

11. On a second trial, for the purpose of showing damage to the full amount of the draft, plaintiff offered in evidence a judgment record in an action brought by it in a Pennsylvania court against the drawer, whereby it was adjudged that the acceptance of the check and omission to make due present-

ment constituted as between the drawer, the payee and defendant a payment and discharged the drawer's liability. *Held*, that the record was competent evidence and conclusively established plaintiff's damages to be the full amount of the draft. *Id.*

12. Also *held*, that it was not incumbent upon plaintiff as a condition of recovery to tender the draft to defendant. *Id.*
13. The new trial was had after the going into effect of the law of 1879 (Chap. 538), fixing the rate of interest at six per cent. *Held*, that plaintiff was only entitled to interest at that rate for the whole period after the cause of action accrued. *Id.*
14. An employer does not undertake, absolutely, with his employes for the sufficiency or safety of the implements and facilities furnished for their work, but only for the exercise of reasonable care; and when injury to an employe results from a defect in the implements, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith.* 470
15. Defendant, J. T. S., a painter, contracted to paint the inside of the dome of a court-house. Having no experience in building scaffolds, or knowledge of that business, he made a contract with defendant J. S., an experienced scaffold-builder, to erect the necessary scaffolding, which was to be first-class. Through the negligence of J. S., the scaffold was defectively constructed, and, in consequence, while D., plaintiff's intestate, who was in the employ of J. T. S., was at work upon the scaffold, it gave way, and D. received injuries causing his death. In an action to recover damages, it did not appear that J. T. S. knew, or had reason to know, of any defect in the scaffold. *Held*, that J. S. was not the agent, or servant, of J. T. S., but an independent contractor, for whose acts or omissions the latter was not lia-

ble; that it was not negligence for him to rely upon the judgment of J. S. as to the sufficiency of the scaffold, and the propriety of the mode of construction; and that, therefore, J. T. S. was not liable. But *held* (EARL, J., dissenting), that J. S. was liable, as, although there was no privity of contract between him and D., he had contracted to build a structure for the workmen of J. T. S., any defect wherein, which would cause it to give way, would naturally result in injury to said workmen, and he owed them a duty to use proper diligence, independent of his contract. *Id.*

16. Where one, in making improvements upon his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage irrespective of any question of care or negligence, and a license from the municipal authorities cannot affect the question of responsibility. *Mairs v. Manhattan R. E. Ass'n.* 498

— *Liability of railroad company for negligent or unlawful act of conductor.*

See Schultz v. T. A. R. R. Co. 242

— *Liability of owner of carriage, which when driven by his servant runs over one crossing the street.*

See Groth v. Washburn. (Mem.) 615

— *When question of negligence one of fact.*

See Cleveland v. N. J. S. Co. (Mem.) 627

NEW YORK (CITY OF).

1. The omission to file a map in accordance with the provision of the act of 1870 (§ 2, chap. 626, Laws of 1870), requiring the department of public parks in the city of New York to cause to be made maps and plans of the streets laid out, altered, etc., is not a substantial or vital error rendering an assessment for a change of grade of an existing and established street invalid; the filing of the

map is not an indispensable prerequisite to the establishment of a new grade, but simply a matter of form, a mere irregularity which furnishes no ground for vacating or setting aside the assessment. *In re Upson.* 67

2. The title of the act of 1872 (Chap. 872, Laws of 1872), entitled "An act in relation to the Croton aqueduct and other public works in the city of New York," sufficiently states the subject of the act, and so it is not obnoxious to the provision of the State Constitution (Art. 3, § 16), requiring the subject of a local or private bill to be expressed in its title. *Id.*

3. In 1859 a contract was awarded to one McG. to regulate and grade a certain portion of Fifth avenue. It provided that, in case the grade should be changed during the progress of the work, the contractor was to conform to the altered grade at the contract-prices, so far as applicable; this contract was not completed until 1875, several months previous to which time a new contract was made with E. to regulate and grade, in accordance with a new grade, under an ordinance of the common council, passed in 1874. If the work had been done under the contract of McG. the expense would have been much less. *Held*, that, as it did not appear that there was any such difference or change made as rendered the first contract inapplicable, or that it could not have been enforced, the parties assessed were entitled to the benefit of the reduced prices; that the error, however, furnished no ground for vacating the assessment entirely, but simply for a reduction. *Id.*

4. Under the provision of the act relating to buildings in the city of New York (§ 16, chap. 625, Laws of 1871, as amended by § 5, chap. 547, Laws of 1874), which provides that the opening of any elevator or hoistway in a building in said city shall be protected on each floor by railings and trap-doors, and that the trap-doors shall

be kept closed at all times except when in actual use "by the occupant or occupants of the buildings having the use and control of the same;" where there are several occupants of a building, the duty is imposed upon the one whose use of the elevator or hoistway requires the opening, and whose disuse permits the close of the trap-doors; no one of them can be made liable for the neglect of another to perform such duty. *Harris v. Perry.* 308

5. The provisions of the act entitled "An act in relation to regulating and grading the Eighth avenue in the city of New York" (Chap. 593, Laws of 1870), which authorize the commissioners of public parks to change the grade of streets intersecting said avenue to conform to the grade thereof, are void, as the including them in the act renders it repugnant to the constitutional provision (State Const., art. 8, § 16) declaring that a local or private bill shall embrace but one subject, and that shall be expressed in the title. *In re Blodgett.* 392

6. Under the provision of the act of 1871 (§ 4, chap. 226, Laws of 1871), authorizing the commissioner of public parks of the city of New York "to fix and establish the grades of the streets," within a specified territory "where the same have not heretofore been fixed and established by law," not only were such grades excepted as had been fixed by legislative enactment, but also those lawfully established by ordinance of the common council. *In re Mut. L. Ins. Co.* 530

7. The provision does not authorize a change of grade, but deals only with streets whose grades have not been lawfully established. *Id.*

8. Where, however, it appeared, upon application to vacate an assessment, that the commissioner changed slightly the grade of a small section of a street, and that more than the increased cost of the improvement occasioned by the change was charged upon the city,

because in excess of one-half the valuation of the property benefited, so that if the extra cost of the illegal work had been, in the first instance, left out of the assessment, or should be deducted therefrom, the cost of work lawfully done would exceed the amount of the assessment. *Held*, that there was no substantial error, and that an order vacating the assessment was error. *Id.*

9. The sidewalks of the street were laid but four feet wide. The ordinance, in general terms, directed that the sidewalks be flagged, without specifying the width. It was passed a short time prior to the passage of the city charter of 1873 (Chap. 335 of the Laws of 1873), which repealed the provision of the charter of 1870 (§ 1, chap. 383, Laws of 1870) requiring all flagging to be laid "full width," i. e., twelve feet. It did not appear, however, that the contract for the work was made before such repeal. *Held*, that the objection was untenable; that the burden was upon the petitioner to show substantial error, and this he failed to do, as it was entirely possible that the work was in violation of no existing statute applicable to it when done. *Id.*

10. The scheme of sewer improvements in the city of New York contemplates that the whole expense should be borne by the property benefited. *In re Lowden.* 548

11. Engineers' and surveyors' fees are properly included in an assessment for such an improvement, as an item of the expenses, and although the mode of ascertaining may not give the exact cost of this item, if it approximates thereto and the charge does not appear to be in excess of the sum properly chargeable to the work, it is not a tenable objection to the assessment. *Id.*

12. Nor is it a valid objection that the engineers by whom the work was done were already in the employ of the city, under a salary which had been paid. *Id.*

13. When, therefore, an assessment for such a work included an item for engineers' and surveyors' fees, which was made under the supervision of the chief engineer of the bureau of sewers, and was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to the sewerage of the city done during the year, as would remunerate the city for the moneys paid for engineers' expenses; *held*, that in the absence of evidence that the share imposed upon the petitioner was enhanced, or that this item of expense could be arrived at in a way better or more just to him and the public, it was properly included. *Id.*

14. The statutes in relation to assessments for such improvements provide for sufficient notice and hearing to persons affected by an assessment to meet the constitutional requirements. *Id.*

15. Where the published notice required objections to an assessment to be presented to the "board of assessors," instead of to the chairman of that board as prescribed in the act of 1841 (§ 1, chap. 171, Laws of 1841), *held*, that the variance was immaterial, as the objections, if any were made, were for the board, not for its chairman alone, to consider. *Id.*

NOTICE.

Notice to debtor of assignment of debt not necessary to make assignment valid, only necessary to prevent subsequent bona fide payment by debtor.
See Williams v. Ingersoll. 508

NUISANCE.

1. The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway is not *per se* a nuisance. *People v. N. Y., N. H. & H. R. R.* 266

2. The duty of restoration of "the highway as near as may be to its

former state, so as not to unnecessarily impair its usefulness," imposed by its charter (§ 5, chap. 195, Laws of 1846), upon the N. Y., N. H. & H. R. R. Co., does not absolutely require it, at such a crossing, to construct the bridge of the full width of the highway, the requirement is simply to so construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway. *Id.*

3. Upon the trial of an indictment against said corporation for alleged nuisance in constructing a bridge over its road for a highway, of less width than the highway, it appeared that the highway, when defendant's road was constructed, was owned by a turnpike company which, by its charter (Chap. 121, Laws of 1800), was required, where a bridge was necessary, to build it not less than sixteen feet wide. Defendant, prior to 1850, constructed its road across the highway below its surface, and built a bridge for the highway about sixteen feet wide; this was replaced by a new one in 1852 or 1853 about nineteen and one-half feet wide; both were approved by the turnpike company. In 1879, after the rights of said company in the highway had been extinguished, defendant built the bridge in question, which was twenty-four feet wide, with the roadway twenty-two and one-half feet in width, corresponding substantially with the width of the beaten track of the highway. The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance and defendant was guilty under the indictment; that the question was whether the bridge was so constructed "as not to impair the usefulness of the road and to interfere with the enjoyment or safety of the public." *Held* error. *Id.*

4. Conceding the rule that, as to the traveling public, an excavation in a street made by consent of the municipal authorities is not *per se* unlawful, and a nuisance, and that the person making the same is

only liable for the omission of proper care, such rule does not apply when the excavation causes injury to adjoining land by collecting surface water or diverting it from its proper channel, and thus throwing it upon such land. *Mairs v. Manhattan R. E. Ass'n.*

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OFFICE AND OFFICERS.

Ministerial officers can only be made liable to an individual for damages caused by an alleged nonfeasance upon proof showing an omission on their part to perform a plain duty devolved upon them by law. *Fitzpatrick v. Slocum.*

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ORDER.

A valuable consideration is an essential and necessary element of an equitable assignment, and to make an order or direction to pay effectual as an assignment, it must appear that such a consideration was paid therefor. *Tallman v. Hoey.*

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PARTIES.

1. The provision of the Code of Civil Procedure in regard to amendments (§ 723) does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants. *N. Y. S. M. M. P. Ass'n v. Rem. Ag. Works.* 22
2. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. *Hall v. Brooks.* 83
3. An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor. *Id.* 51
4. Any person claiming an interest in the personalty of a deceased testator, either as legatee under the will, or as entitled to it under the

statute of distributions, may, when the executor claims such interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as the plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. *Wager v. Wager.*

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5. An heir at law or devisee, who claims a mere legal estate in real property, where there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. *Id.*

PARTNERSHIP.

In an action by a firm creditor to reach lands purchased and paid for by S., a member of the firm, but conveyed to his wife, with intent, as alleged, to defraud creditors, it appeared that such conveyance was made about four years prior to the contracting of the debt to plaintiff; that after payment for the lands, the price of which was \$10,000, S. had several thousand dollars worth of individual property, and, so far as appeared, owed no individual debts; that the firm was entirely solvent and was doing a prosperous business. *Held*, that the evidence justified a finding that there was no fraud, and an affirmance of the validity of the conveyance. *Phoenix B'k v. Stafford.* 405

— *Liability of partners for a fraud perpetrated by a co-partner in transacting partnership business.*

See Bradner v. Strang. 299

— *When estate of deceased partner not entitled to be allowed profits of business after the decease.*

See Wilson v. Simpson. (Mem.) 619

— *Liability of member of a firm upon indorsement, made in name of firm after its dissolution.*

See N. S. & L. Bank v. Hers. (Mem.) 629

PAYMENTS.

— To prevent the running of statute of limitations, payments must be made by the party or his authorized agent, payment by joint-maker insufficient.

See *McMullen v. Rafferty*. 456

— When payment by broker to sheriff of proceeds of sale of goods under order of court, in supplementary proceedings against agent of owner, no defense to action by owner to recover such proceeds.

See *Wright v. Cabot*. 570

PERPETUITIES.

• See SUSPENSION OF POWER OF ALIENATION.

PLEADINGS.

1. Plaintiff's complaint, in an action for conversion of personal property, alleged in substance the execution and delivery to plaintiff by W., the then owner, of a chattel mortgage upon the property, a demand of payment, and that "thereupon, pursuant to said mortgage, plaintiff was entitled to the immediate possession and control of the property so mortgaged and became the owner thereof, and thereupon took the same into his possession," and while lawfully and quietly possessed thereof, that defendant wrongfully took and converted the same. A copy of the mortgage was attached. By its terms, the debt secured by the mortgage was payable on demand. Defendants demurred, claiming that the complaint was defective in not averring that default had been made in the payment of the mortgage. *Held* untenable; that the allegations of ownership and lawful possession were sufficient without setting forth in detail how title was acquired; and also that a default was clearly to be implied from the facts stated. *Malcom v. O'Reilly*. 156

2. Two policies of fire insurance contained a condition that the com-

pany would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied. *Held* error; as although the condition had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages. *Ellsworth v. Aetna Ins. Co.* 186

3. Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon the trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized. *Held* untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. (Code of Civil Procedure, § 722.) *Schultz v. T. A. R. Co.* 242

4. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim. *Held*, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. *Mairs v. Manhattan R. E. Ass'n.* 498

POWERS.

1. Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title and the heirs are entitled at law to the intermediate rents and profits. *Lent v. Howard.* 169
2. If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund; the heir may be compelled to account therefor to the executor, and the latter to the beneficiary, for so much thereof as is received by him, as well as for the proceeds of sales. *Id.*
3. Where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion, and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale. *Id.*

PRACTICE.

1. *It seems* that it is only when some

person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. *People v. Bklyn F. & C. I. R. R. Co.* 75

- 2 The attorney-general, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. *Id.*

8. Exceptions taken upon the trial of specific questions of fact arising in an equity action and ordered to be answered by a jury should be presented for review before final judgment; they may not be considered on motion for a new trial of the action after judgment. *Chapin v. Thompson.* 270

4. On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception. *Held* no error; that while defendants were entitled to the whole of the letters their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. *Wright v. Cabot.* 570

— Upon reversal of judgment by General Term on ground of insufficiency of evidence, new trial should be ordered unless a recovery on such trial would be impossible.

See Gawthrop v. Leary. (Mem.) 623

See PLEADINGS.
TRIAL.

PRINCIPAL AND AGENT.

1. The rule that a third person may deal with an agent as principal, who holds himself out as such, concealing his agency, and not disclosing its origin, and that the real principal cannot so assert his rights as to cut off equities which have grown up between such third person and the agent, has no application when the former knew, or had sufficient information to fairly create an inference of the existence of the agency, and to put him upon inquiry, although the name of the principal was not disclosed. *Wright v. Cabot.* 570

2. Where, therefore, plaintiffs consigned certain merchandise to the firm of E. & C. S. for sale, which firm employed defendants as brokers to and they did make the sale, with knowledge that E. & C. S. were not the sole owners of the goods, or under circumstances sufficient to put them upon inquiry, held, that an application of a portion of the proceeds of the sale in payment of a prior indebtedness of E. & C. S. to them was unauthorized, and that plaintiffs were entitled to recover the same. *Id.*

— Authority to draw check in wife's name cannot be inferred from the fact that husband made the deposits for his wife.

See Bates v. F. N. Bank. 288

— When principal bound by construction given to terms of a contract by his agent.

See Steen v. N. F. Ins. Co. 315

PRINCIPAL AND SURETY.

As to whether, where an executor has given security, his sureties will be held responsible for a debt due from him to the estate as for so much money received, *quære.* *Baucus v. Stover* 1

PROHIBITION (WRIT OF).

1. A writ of prohibition is not demandable as matter of right, but

of sound judicial discretion. *People, ex rel. Adams, v. Westbrook.* 152

2. An order of the General Term of the Supreme Court, therefore, denying the writ is not reviewable here. *Id.*

3. *It seems* that the writ should be issued only in cases of extreme necessity and not for grievances which may be redressed by ordinary proceedings, at law, or in equity, or by appeal. *Id.*

4. The history of the writ in England stated, and the authorities collated. *Id.*

PROPERTY.

— Right to seat in New York Cotton Exchange is property. *See Powell v. Waldron.* 328

QUESTIONS OF LAW AND FACT.

— When question as to jurisdiction of County Court is one of fact, and so not reviewable here.

See Coe v. Raymond. (Mem.) 612

— Where, upon trial, parol evidence is given without objection as to terms of contract in addition to a written contract, and the question as to where the contract was, is thus submitted as a question of fact, and there is evidence sufficient to sustain a verdict, it is conclusive here.

See DeBevoise v. P. & S. S. Co. (Mem.) 614

— When question of negligence one of fact.

See Cleveland v. N. J. S. Co. (Mem.) 627

RAILROAD CORPORATIONS.

1. The provisions of the Railroad Acts (§ 1, chap. 292, Laws of 1854; § 1, chap. 469, Laws of 1873; § 1, chap. 710, Laws of 1873) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad corporation, to organize a new corporation for the pur-

- poses of the transfer, do not prevent a sale or transfer by such a purchaser to a corporation already existing and capable of holding the property and exercising the franchises; the authority so given by said provisions was intended to meet a case where there is no such existing corporation. *People v. Brooklyn, etc., R. R.* 75
2. It is not essential for the purchasing company to file a map of the line thus acquired where it is already constructed. *Id*
 - 3 The provision of the State Constitution (Art. 3, § 18) prohibiting legislation authorizing the "construction or operation of a street railroad," except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws. *Id.*
 4. Accordingly *held*, that said provision did not affect the provision of the Railroad Act of 1839 (§ 1, chap. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations for the use of their respective roads; and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision. *Id.*
 5. The provisions of the Railroad Act of 1850 (Chap. 140, Laws of 1850) were not rendered inoperative as to railroads running "over, under, through or across streets," by the Rapid Transit Act, so called (Chap. 606, Laws of 1875), as by the latter act, it is declared that it "shall not be construed to repeal or in any manner to affect" the former *Id.*
 6. By defendant's charter, its terminus in Brooklyn was "at or near Atlantic avenue;" its line, as shown upon the map and survey filed, stopped twelve feet south of the south line of the avenue. It acquired the right to run its cars upon the tracks of the L. I. Co. whose road was constructed along the center of the avenue, and tracks were constructed by the L. I. Co. connecting those of the two roads; similar curved tracks had long been used by the L. I. Co. to reach its depot south of the avenue and for other purposes. The L. I. Co., by its charter, had the right to build such appendages as it deemed necessary, and branches when land was offered without expense. *Held*, that by defendant's charter its terminus was not necessarily south of the avenue, and there was nothing therein to prevent it from making such terminus in the center thereof where it could connect with the other road; that the connecting tracks were authorized by the charters of the two companies, and the provision of the act of 1850 (§ 28, subd. 6), authorizing railroad companies to connect their roads, and in no respect could they be considered as a separate and independent line, and so requiring all the steps necessary to a newly-organized street railway. *Id*
 7. The map required to be filed by a railroad company is sufficient if it shows the alignment and profile; it is not essential that it should show all the connections, turnouts and switches. *Id.*
 8. At the time of the passage of the act of 1859 (Chap. 484, Laws of 1859), providing, among other things, for the relinquishment by the L. I. Co. of the right to use steam power within the city of Brooklyn, it was rightfully running its trains by steam through Atlantic avenue. In pursuance of that act it relinquished such right in consideration of a payment made to it, which was assessed upon property benefited, and the road was thereafter operated by horse power until 1876, when the common council of said city passed a resolution, authorizing the use of steam in drawing cars on said avenue, and the legislature passed

an act (Chap. 187, Laws of 1876) authorizing such use by the L. I. Co., and immediately thereafter the use of steam power was resumed. In 1879 defendant under its contract ran its cars on the avenue in the same way. *Held*, that the act of 1876 removed the restriction, leaving the original charter power of the L. I. Co. in full force; that it had the right to determine what motive power should be used, both as to its own cars, and as to others which it could lawfully permit to come upon its road; and as, by its lease to defendant, the latter was authorized to use steam power, it could lawfully use it to run its cars on the avenue. *Id.*

9. Also *held*, that said act of 1876 was not violative of the provision of the State Constitution (Art 3, § 18) which prohibits the passage of any private or local bill granting "any exclusive privilege, immunity or franchise whatever." *Id.*

10. Also *held*, that the question, whether said act was violative of the constitutional prohibition against legislation impairing the obligation of contracts, could not be presented in actions brought by the State against defendants to which the assessed land-owners, who alone had such contract rights, if any existed, were not parties. *Id.*

11. Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon the trial the court ruled in substance that plaintiff

could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized. *Held* untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. (Code of Civil Procedure, § 722.) *Schultz v. Third Ave. R. R.* 242

12. Also *held*, that defendant was liable for the act of the conductor in throwing plaintiff from the car. *Id.*

13. The evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and another witness for defendant that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order so as to fix the company with liability in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded. *Held* error. *Id.*

14. The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway is not *per se* a nuisance. *People v N. Y., N. H. & H. R. R.* 266

15. The duty of restoration of "the highway as near as may be to its former state, so as not to unnecessarily impair its usefulness," imposed by its charter (§ 5, chap. 195, Laws of 1846), upon the N. Y., N. H. & H. R. R. Co., does not absolutely require it, at such a crossing,

to construct the bridge of the full width of the highway, the requirement is simply to so construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway. *Id.*

16. Upon the trial of an indictment against said corporation for alleged nuisance in constructing a bridge over its road for a highway, of less width than the highway, it appeared that the highway, when defendant's road was constructed, was owned by a turnpike company which, by its charter (Chap. 121, Laws of 1800), was required, where a bridge was necessary, to build it not less than sixteen feet wide. Defendant, prior to 1850, constructed its road across the highway below its surface, and built a bridge for the highway about sixteen feet wide; this was replaced by a new one in 1852 or 1853 about nineteen and one-half feet wide; both were approved by the turnpike company. In 1879, after the rights of said company in the highway had been extinguished, defendant built the bridge in question which was twenty-four feet wide, with the roadway twenty-two and one-half feet in width, corresponding substantially with the width of the beaten track of the highway. The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance and defendant was guilty under the indictment; that the question was whether the bridge was so constructed "as not to impair the usefulness of the road and to interfere with the enjoyment or safety of the public." *Held* error. *Id.*

17. Plaintiff on September 21, 1877, purchased in St. Louis a ticket for a passage from that city to New York over the several railroads mentioned in coupons annexed. It was specified on the ticket that it was "good for one continuous passage to point named in coupon attached;" also that the company selling the ticket acted only as agent for the other roads, and as-

sumed no responsibility beyond its own line, and that the holder of the ticket agreed with the several companies "to use the same on or before" September 26, and if he failed so to do, either of the companies might refuse to accept the ticket and demand full fare. Plaintiff left St. Louis on the day he bought the ticket; he stopped over at Cincinnati and at Cleveland; he reached Buffalo the 24th, having used all the coupons except one entitling him to passage over defendant's road; he stopped there a day and then purchased a ticket from Buffalo to Rochester, where he remained until the afternoon of the 26th, when he took passage for New York. He presented his ticket to the conductor; it was accepted and punched several times, but when the train reached Hudson, about 3 A. M., September 27, the conductor declined to recognize the ticket, and upon plaintiff's refusal to pay fare to New York, ejected him from the car. On the trial of an action to recover damages, after proof of these facts, plaintiff was nonsuited. *Held* error; that the contract evidenced by the ticket was not by any one company, or jointly by all the companies named, but was a separate contract by each company for a continuous passage over its road; that plaintiff was not bound to commence his passage on defendant's road at Buffalo, but could commence it at any intermediate point between that city and New York, being only required when commenced to make it continuous; that plaintiff having commenced his passage on the 26th, having presented his ticket and the same having been accepted, it was then used within the meaning of the contract, and as it was not specified that the passage should be completed on that day, he was entitled to go through on the ticket. *Auerbach v. N. Y. C. & H. R. R. Co.* 281

18. Plaintiff was employed as a carpenter by defendant who was operating a railroad, he was directed to assist in loading car-wheels, which work was being

done under the direction of a foreman. The car-wheels were in pairs, connected by an axle and standing on a track; and were loaded by an implement called a "jigger," one end of which was placed upon the tracks, and the other upon the platform of the car. It was composed of two side pieces, corresponding with the rails of the track, connected by cross-bars; the end upon the car was furnished with hooks to hold it in place. One side of the jigger was worn off so as to make it shorter than the other, the hooks were worn off and blunted so as not to hold firmly to the car, and the cross-bars were worn and loose. After two pairs of wheels were loaded, the others were run along the track so as to give them a headway before striking the jigger; it was customary to load in this way. As the last pair was being loaded one end of the jigger slipped from the car, the wheels fell, struck and injured the plaintiff. Plaintiff had never before loaded car-wheels or seen them loaded, and did not know what a jigger was. Defendant's master-mechanic had, prior to the accident, been notified that the jigger was defective. In an action to recover damages, where these facts appeared, *held* (RAPALLO and EARL, JJ., dissenting), that the evidence tended to show defendant furnished an imperfect implement, and that the injury was occasioned thereby; and so that the question of negligence and contributory negligence should have been submitted to the jury, and a nonsuit was error. *Kain v. Smith.* 375

19. As to whether, where the proposed route of a railroad company crosses the track of an existing company, the latter can apply for the appointment of commissioners, under the General Railroad Act (§ 22, chap. 140, Laws of 1850, as amended by § 1, chap. 560, Laws of 1871), to change such route, *quære*. *In re L. S. & M. S. R. R. Co.* 442

20. On appeal to this court brought to review the decision of the commissioners appointed for such purpose, only questions of law can be

considered and determined, and all that can be done by the General Term of the Supreme Court, or by this court, is to send the report back where errors of law have been committed. *Id.*

21. Where commissioners to change the route are appointed on the application of an existing railroad company, they have no power to determine the grade at which the proposed route shall cross the tracks of the petitioner. *Id.*

22. The fact that the route as located by the new company runs through ground already appropriated by the petitioner for transfer, storage and depot purposes does not make it error for the commissioners to refuse to adopt the route proposed by the petitioner. The question, whether the new company has located its line over lands it cannot condemn for railroad purposes, is not one properly to be determined by said commissioners. *Id.*

23. In proceedings by a railroad corporation to acquire title to lands under the water of the Hudson river which had been granted by the State to the owners of the uplands, the petition contained an offer on the part of the company to construct a draw-bridge to give access from the river to the docks of the land-owners. After an order had been made and appealed from appointing commissioners, on application of the company an order was granted giving it leave to withdraw the offer and to amend the petition accordingly. *Held*, that the court had no power to so amend the petition; that no such power was given by the provision of the General Railroad Act (§ 20, chap. 140, Laws of 1850), which authorizes the correction of "any defect or informality." *In re N. Y. & W. S. R. R. Co.* 453

RECEIVER.

1. The provision of the act of 1869 in reference to the appointment of receivers of insolvent life insurance

- companies, which authorizes the superintendent of the insurance department to fix the compensation of such receivers (§ 13, chap. 902, Laws of 1889), does not make the decision of that officer conclusive; but upon the presentation of the accounts of a receiver to the court for settlement, the jurisdiction of the superintendent and the regularity of its exercise are before the court, and may be determined by it. *Atty.-Gen'l v. N. Am. L. Ins. Co.* 94
2. The said provision confers authority to fix compensation for services rendered, not a rate of compensation for future services. *Id.*
 3. Parties interested in the fund are also entitled to notice and an opportunity to be heard. *Id.*
 4. Where, therefore, the superintendent, at the request of a receiver, made before his services had approached completion, and upon an estimate of the assets, less than one-half of the amount upon which the receiver claimed compensation, fixed the rate of allowance at five per cent, without notice to any one interested in said assets, *held*, that the order was premature; and that an order made upon settlement of the receiver's account directing a reconsideration by the superintendent of his order was proper. *Id.*
 5. The proceeds of the securities deposited with the superintendent, as a special fund to secure registered policies, are assets in the hands of the receiver, and he is entitled to commissions thereon. *Id.*
 6. Premium notes and loans made on policies are not assets upon which the receiver is entitled to commissions; they constitute merely offsets against the liability of the company. *Id.*
 7. Where a receiver had advanced money to pay taxes upon lands covered by mortgages in the hands of the superintendent, then being foreclosed, which advances were repaid from the proceeds of the foreclosure, *held*, that the receiver was not entitled to commissions upon the sum so refunded. *Id.*
 8. The special fund in the hands of the superintendent is properly chargeable with its proportionate share of the expenses of the trust. *Id.*
 9. The receiver has no authority without the direction or consent of the court to invest the moneys in his hands; in the absence of directions it is his duty simply to keep and protect the trust fund, and hold it ready for distribution. *Id.*
 10. Where, however, a receiver without authority from the court, but acting in entire good faith, placed the fund in the hands of brokers to be loaned on call, and charged himself with the amounts received for interest, it appearing that no part of the fund was lost, and that the parties interested therein were not injured, but were probably benefited, *held*, that an order charging the receiver with interest beyond the amount received was error. *Id.*
 11. An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attorney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability. *Barnes v. Newcomb.* 108
 12. By the by-laws of the "New York Cotton Exchange" a seat in the Exchange, the right to which is evidenced by a certificate of membership, is transferable by assignment of the certificate to members under certain prescribed rules and restrictions. *Held*, that such a right was property, and as such passed to a receiver appointed in supplementary proceedings on execution against the owner; and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor

as collateral for a loan. *Powell v. Waldron.* 828

13. In an action by such a receiver to redeem and to compel the holder of a certificate so pledged to re-transfer on payment of the loan, *held*, that defendant could not defend on the ground of irregularities in the appointment of the receiver, it appearing that the judgment debtor consented to the appointment and so waived all irregularities. *Id.*

14. A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may, under the Code of Civil Procedure (§ 682), move to vacate the attachment without being made a party to the action. *Nat. S. & L. B'k v. Mech. Nat. B'k.* 440

RECORDING ACT.

1. The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant; the Recording Act has no application to it. *Dunlop v. Avery.* 592

2. Where one in the possession of lands under a contract for the purchase thereof, and who has made payments upon the contract and has made improvements upon the premises, takes a deed thereof without knowledge of the existence of a prior unrecorded mortgage thereon, giving a bond and mortgage for the whole purchase-price, and in consideration of the conveyance surrenders his rights as vendee in possession, and the deed and subsequent mortgage are recorded before the prior mortgage, he is a *bona fide* purchaser for value within the meaning of the Recording Act (1 R. S. 756, § 1). The title so acquired is superior to such prior mortgage, and a purchaser upon foreclosure of the subsequent mortgage takes the premises freed from the lien of the prior mortgage. *Westbrook v. Gleason.* 641

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REDEMPTION.

By the by-laws of the "New York Cotton Exchange" a seat in the Exchange, the right to which is evidenced by a certificate of membership, is transferable by assignment of the certificate to members under certain prescribed rules and restrictions. *Held*, that such a right was property, and as such passed to a receiver appointed in supplementary proceedings on execution against the owner; and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor as collateral for a loan. *Powell v. Waldron.* 828

REFERENCE.

Where a referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law. *Bonnell v. Griswold.* 122

RELEASE.

In an action brought by plaintiff as assignee in bankruptcy of A. to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest (U. S. R. S., §§ 5197, 5198), defendant interposed as a defense and proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff thereupon gave in evidence the record of a judgment in his favor in an action in which plaintiff as assignee sued defendant to recover a payment made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment, as, to annul the release, plaintiff was bound to show, not only that at its date defendant had reasonable cause to

believe A. to be insolvent, but that he executed it in fraud of the act (U. S. R. S., §§ 5128, 5129) as amended by § 11, chap. 390, Laws of 1874); that proof that a prior payment made by A. to defendant was a fraudulent preference, known to be such, did not establish that a payment by defendant to A. of a debt due the latter was either fraudulent or known to be such. *Getman v. Second Nat. Bk.* 186

SALES.

When vendee not bound to receive goods under contract of sale, where not shipped in the time specified in the contract

See Welsh v. Gossler. 540

See JUDICIAL SALES.

SAVINGS BANKS.

1. Plaintiff and her nephew O'K. opened a deposit account with defendant. When the first deposit was made, plaintiff stated to defendant's officers, in the presence of O'K., that "either of them or both could draw the money." The usual savings bank pass-book was issued in which the deposit was entered to the credit of plaintiff "or" O'K., and the account on the books of the bank was in the same form. One of the rules printed in the pass-book provided that all payments to persons producing the pass-book should be valid to discharge defendant. Subsequent deposits were made, both depositors being present and each contributing to the fund. O'K. having died, plaintiff informed defendant's officers of that fact and that the wife of O'K. had the pass-book, and notified them not to pay the money to her. Defendant, however, on presentation of the book with letters of administration, issued to Mrs. O'K. on the estate of her husband, paid to her the whole deposit. In an action to recover the same, the court directed a verdict for plaintiff for the full amount. *Held* error; that the

right of the bank to pay on the separate order of either of the depositors, and of each of them to demand payment was not terminated by the death of O'K.; that his authority being coupled with an interest, vested on his death in his personal representative; but that defendant, after notice of plaintiff's right to the fund, with a prohibition as to payment to such representative, could not justify such a payment if the money of right, as between plaintiff and the estate of O'K., belonged to her; and that plaintiff was entitled to recover, but only to the amount of the deposits made by her. *Mulcahey v. Em I. Segs. Bk.* 435

2. *It seems* that the case was a proper one for an interpleader in which the rights of the respective claimants could be judicially ascertained. *Id.*

SERVICE (AND PROOF OF).

1. Under the provisions of the Code of Civil Procedure in reference to service of summons by publication (§§ 440, 441, 787), such service is not complete until the expiration of at least six full weeks from the time of the first publication, or, when service is made out of the State, until the expiration of that period after such service. *Market Nat. Bank v. Pacific Nat. Bank.* 397
2. Where, therefore, after the granting of an order of publication, summons was served on defendant out of the State on November 25, 1881, and judgment by default was entered January 20, 1882, *held*, that the judgment was premature; and that an order setting it aside was properly granted. *Id.*

STATE.

1. Where a valid contract has been entered into, on behalf of the State by its duly authorized agents, for the construction of a public work, it cannot, in the absence of any stipulation authorizing it so to do,

destroy or avoid the obligation of the contract. *Danolds v. State*, 86

2. While it may refuse to perform and arrest performance on the part of the contractor, it is liable for the breach of the contract the same as an individual, and the contractor is entitled to claim prospective profits. *Id.*

3. It seems that if the State is not ordinarily liable for prospective profits, it may be subjected to such liability by legislative enactment, and the act constituting the board of audit (Chap. 444, Laws of 1876), which allows to claimants against the State the same measure of relief and justice as they would be entitled to were the claims against individuals, authorized the award made. *Id.*

— Contract with, construed and power of Board of Audit in making allowance upon claims under such contract stated.

See *Swift v. State of N. Y.* 52

STATUTES.

The courts must so construe a statute as to bring it within the constitutional limitations if it is susceptible of such a construction. *Sage v. City of B'klyn.* 189

- Chap. 466, Laws of 1866.
- Chap. 18, Laws of 1869.
- See *People ex rel. v. Hyde*, 11.
- Chap. 450, Laws of 1847.
- See *Littlewood v. The Mayor*, 24.
- Chap. 427, Laws of 1870.
- Chap. 523, Laws of 1874.
- Chap. 211, Laws of 1881.
- Chap. 444, Laws of 1876.
- See *Danolds v. State of N. Y.*, 86.
- Chap. 751, Laws of 1866.
- Chap. 211, Laws of 1881.
- See *Swift v. State of N. Y.*, 52.
- Chap. 626, Laws of 1870.
- Chap. 872, Laws of 1872.
- See *In re Upson*, 67.
- Chap. 282, Laws of 1854.
- Chap. 469, Laws of 1873.
- Chap. 710, Laws of 1873.
- Chap. 218, Laws of 1839.
- Chap. 140, Laws of 1850.

- Chap. 606, Laws of 1875.
- Chap. 484, Laws of 1859.
- Chap. 187, Laws of 1876.
- See *People v. B. F. & C. I. R. Co.*, 75.
- Chap. 902, Laws of 1869.
- See *Att'y-Gen'l v. N. A. L. Ins. Co.*, 94.
- Chap. 40, Laws of 1848.
- Chap. 333, Laws of 1853.
- See *Bonnell v. Griswold*, 122.
- Chap. 384, Laws of 1854.
- Chap. 63, Laws of 1862.
- See *Brevoort v. City of Brooklyn*, 128.
- Chap. 631, Laws of 1868.
- Chap. 384, Laws of 1852.
- Chap. 63, Laws of 1862.
- See *Sage v. City of Brooklyn*, 189.
- 1 R. S. 676, § 70.
- See *Platz v. City of Cohoes*, 219.
- 1 R. S. 728, § 57.
- 2 R. S. 184, § 6.
- See *Robbins v. Robbins*, 251.
- Chap. 466, Laws of 1877.
- Chap. 818, Laws of 1878.
- See *In re Hulburt* 259.
- Chap. 195, Laws of 1846.
- Chap. 121, Laws of 1881.
- See *People v. N. Y., N. H. & H. R. R. Co.* 264.
- Chap. 466, Laws of 1877.
- See 1 R. S. 772, § 2.
- See *Chapin v. Thompson*, 270.
- Chap. 625, Laws of 1871.
- Chap. 547, Laws of 1874.
- See *Harris v. Perry*, 308.
- Chap. 40, Laws of 1848.
- See *Handy v. Draper*, 324.
- See *R. M. N. Bank v. Bliss*, 338.
- 2 R. S. 88, § 38.
- See *Neilley v. Neilley*, 352.
- Chap. 826, Laws of 1866.
- Chap. 863, Laws of 1873.
- Chap. 589, Laws of 1874.
- See *Fitzpatrick v. Slocum*, 358.
- Chap. 593, Laws of 1870.
- See *In re Blodgett*, 392.
- Chap. 782, Laws of 1867.
- 2 R. S. 74, § 28.
- See *In re Curser*, 401.
- Chap. 542, Laws of 1880.
- Chap. 37, Laws of 1848.
- See *N. G. L. Co. v. City of Brooklyn*, 409.
- Chap. 538, Laws of 1879.
- See *F. N. Bank v. F. N. Bank*, 412.
- Chap. 140, Laws of 1850.
- Chap. 580, Laws of 1871.
- See *In re L. S. & M. S. R. R. Co.* 442.
- 2 R. S. 137, § 5.
- See *Murphy v. Briggs*, 446.

— *Chap. 140, Laws of 1850.*
See In re N. Y. & W. S. R.
R. Co., 453.

— *Chap. 69, Laws of 1845.*

See People v. Baker, 460.

— *2 R. S. 220, § 1.*

See Riggs v. Cragg, 479.

— *Chap. 226, Laws of 1871.*

— *Chap. 335, Laws of 1873.*

— *Chap. 383, Laws of 1870.*

See In re M. L. Ins. Co., 530.

— *Chap. 171, Laws of 1841.*

See In re Lowden, 548.

— *2 R. S. 65, § 49.*

See Smith v. Robertson, 555.

— *Chap. 681, Laws of 1881.*

See McIntyre v. Sanford, 634.

— *1 R. S. 756, § 1.*

See Westbrook v. Gleason, 641.

See ACTS OF CONGRESS.

LIMITATIONS OF ACTIONS.

RECORDING ACT.

STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

Where a debtor has conveyed real estate in fraud of his creditors, and at his request his grantee has given a mortgage thereon to secure a debt of the grantor which existed at the time of the conveyance, to a creditor ignorant of its fraudulent character, the mortgage comes within the exception in the statute of frauds (2 R. S. 137, § 5), protecting the rights of purchasers in good faith and "for a valuable consideration," and although the conveyance be set aside in an action brought by other creditors, the mortgage cannot be affected. *Murphy v. Briggs.*

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— *Where one who conveys land under an agreement void by statute of frauds may recover value of land.*

See Day v. N. Y. C. R. R. Co.
(Mem.)

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STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STOCKHOLDER.

— *Of manufacturing corporation, liability of.*

See Handy v. Draper.

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R. M. N. Bank v. Bliss.

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SUBROGATION.

— *When executor sells lands without authority, subject to a mortgage which the purchaser pays and ejectment is brought by heir, the judgment should be without prejudice to purchaser's lien for amount so paid or to his right to be subrogated to rights of mortgagees.*

See Smith v. Robertson.

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SUMMONS.

1. Under the provisions of the Code of Civil Procedure in reference to service of summons by publication (§§ 440, 441, 787), such service is not complete until the expiration of at least six full weeks from the time of the first publication, or when service is made out of the State, until the expiration of that period after such service. *Market Nat. Bk. v. Pacific Nat. Bk.*

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2. Where, therefore, after the granting of an order of publication, summons was served on defendant out of the State on November 25, 1881, and judgment by default was entered January 20, 1882, *held*, that the judgment was premature; and that an order setting it aside was properly granted. *Id.*

SUNDAY.

1. Where, through culpable omission of duty upon the part of the municipal corporation, a city street has become obstructed, and in consequence a traveler upon the street is injured, it is no defense to an action against the municipality to recover damages that the accident happened upon Sunday, and that the person injured was, in traveling on that day, violating the statute relating to the "observance of Sunday." (1 R. S. 676, § 70.) *Platz v. City of Cohoes.*

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2. The courts may not add to the penalty imposed by that statute a forfeiture of the right to indemnity for an injury resulting from defendant's negligence, and the violation of the statute cannot be

regarded as the immediate cause of injury. *Id.*

so did not authorize the superintendent to discharge such duties. *Id.*

SUPERINTENDENT OF PUBLIC INSTRUCTION.

SUPPLEMENTARY PROCEEDINGS.

1. The superintendent of public instruction has no power to remove the principal of a normal school established under the act of 1866 (Chap. 463, Laws of 1866), without the concurrence of the local board. *People, ex rel. Gilmour, v. Hyde.* 11

2. The provision of said act (§ 4) declaring that the "employment" of teachers in said schools shall be subject to the approval of the superintendent refers to the act of hiring. When the approval is once given, the contract of employment is complete, and the teacher can only be discharged by the authority in whom the power to employ is vested, i. e., by the concurrent act of the local board and the superintendent. *Id.*

3. It is not within the power of the superintendent, by annexing conditions to his approval, to change the law regulating the discharge of teachers of these schools. *Id.*

4. The local board of a normal school employed one H. as principal, which employment was approved by the superintendent "to continue in force during the pleasure of the board and the superintendent;" thereafter the superintendent withdrew his approval and directed the local board to recommend another principal, and upon its declining so to do, made an appointment himself which the board refused to recognize. In proceedings by *mandamus* to compel such recognition, *held*, that the superintendent had no authority to attach to his approval the qualification stated; that, notwithstanding the action of the superintendent, H. remained principal, and the refusal of the board to make a new appointment was not an omission "to discharge its duties" within the meaning of the amendatory act of 1869 (Chap. 18, Laws of 1869), and

By the by-laws of the "New York Cotton Exchange" a seat in the Exchange, the right to which is evidenced by a certificate of membership, is transferable by assignment of the certificate to members under certain prescribed rules and restrictions. *Held*, that such a right was property, and as such passed to a receiver appointed in supplementary proceedings on execution against the owner; and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor as collateral for a loan. *Powell v. Waldron.* 328

— When payment by broker to sheriff of proceeds of sale of goods under order of court in supplementary proceedings against agent of owner no defense to action by owner to recover such proceeds. *See Wright v. Oabot.* 570

SURROGATE'S COURT.

1. Under the provision of the Revised Statutes (2 R. S. 84, § 18) declaring that any just claim which a testator had against one named as executor of his will shall be included in the inventory, "and such executor shall be liable for the same as for so much money in his hands * * * and he shall apply and distribute the same in the payment of debts," etc., an executor, although insolvent at the time of his appointment, is bound to account for a debt so due from him, and should be charged therewith on settlement of his accounts as for so much money in his hands. (MILLER and FINCH, JJ., dissenting.) *Baucus v. Stover.* 1

2. *It seems*, however, that the liability of the executor is not in all respects the same as if he had

actually received so much money ; if wholly unable to pay in pursuance of an order or decree of the surrogate, because of insolvency, he cannot be attached and punished for contempt, nor would he be guilty of embezzlement. *Id.*

8. *It seems* also to be proper for a surrogate, in a decree which charges an executor with a debt due from him, to specify the charge thus made separately, so as to protect his rights. (Code of Civil Procedure, § 2545.) *Id.*

4. *It seems*, that where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. *Wager v. Wager.* 161

5. The provision of the Revised Statutes, prohibiting an executor or administrator from retaining any part of the property of the decedent, "in satisfaction of his own debt or claim until it shall have been proved to or allowed by the surrogate" (2 R. S. 88, § 83), gives to the surrogate jurisdiction to pass upon and settle claims held by the executor or administrator in a representative capacity against the estate, as well as one held by him individually. *Neilley v. Neilley.* 352

6. Accordingly *held*, that a surrogate, on settlement of the accounts of an administrator, had jurisdiction to pass upon and settle a claim against the estate held by him as the administrator of another estate, and that a decree of the surrogate disallowing said claim, was a bar to an action to recover the same. *Id.*

7. Also that the fact that another was joined as administrator of one estate while he was sole administrator of the other was immaterial. *Id.*

8. Where a surrogate issued letters of administration to one of two sisters who was unmarried, with-

out notice to the other, who was married, *Held*, that the provision of the Code of Civil Procedure (§ 2662) requiring notice to every person having a prior or equal right did not apply, and that the appointment was valid. *In re Curser.* 401

9. A Surrogate's Court can only exercise the powers prescribed by statute, and such incidental powers as are requisite to the exercise of the powers expressly given, or to the attainment of justice in the cases to which its jurisdiction extends. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, either given expressly or by implication, the whole proceedings are void. *Riggs v. Cragg.* 479

10. In proceedings under the statute (2 R. S. 220, § 1), for a special accounting of an executor, at the instance of a legatee, to enforce the payment of a legacy, the surrogate has only jurisdiction to decree payment where the legacy is undisputed. When upon such an application the surrogate can see that other persons may claim, and a real question is presented as to the right of one of several persons to the legacy or fund, he may not proceed to a determination without the presence of all the parties who may be affected by the adjudication ; these can only be brought in upon a final accounting, and only in that proceeding has the surrogate jurisdiction to settle and adjust conflicting rights and interests. *Id.*

11. *It seems* that a surrogate has jurisdiction to pass upon the construction of a will, where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made. *Id.*

SUSPENSION OF POWER OF ALIENATION.

1. The creation of a trust in real estate does not *ipso facto* suspend the power of alienation, it is only

suspended where a trust term is created either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. *Robert v. Corning.* 225

2. Where the trustee is empowered to sell without restriction as to time, that being left to his discretion, he to receive, pending the sale, the rents and profits for the benefit of beneficiaries, the power of alienation is not suspended, although a sale be postponed by the non-action of the trustee. The fact that the interest of the beneficiaries is inalienable by statute during the existence of the trust does not suspend the power of alienation. *Id.*

3. The statute of perpetuities is pointed only to the power of alienation, not to the time of its actual exercise, and there can be no unlawful perpetuity unless the power of sale is suspended. *Id.*

4. The mere fact that it may be the duty of executors, in the exercise of their discretion, to postpone a sale to await a more favorable market, does not constitute such a restraint as suspends the power of alienation within the statute. *Id.*

5. So also said statute is not violated by directions as to sales which require the giving of notice or the doing of other preliminary acts, which may involve some delay in the actual conversion. *Id.*

6. *It seems* that if the limitation of the interests in the proceeds is illegal, the power of sale to accomplish that purpose may be void. *Id.*

7. The will of R. directed his executors to sell and dispose of his residuary estate; that portion of the real estate situate in this State to be sold at public sale in the city of New York after three weeks published notice, the other real estate in such places and manner as the executors should deem best. After directions as to the disposition of

the proceeds, there followed this clause: "In view of the present great depression in real estate, it is my will that my executors * * * exercise their discretion as to the time to sell the same not longer then three years after my decease." The rents, income and profits up to final distribution, the executors were directed to divide semi-annually "among those to whom the bequests are made" in certain proportions. In an action to obtain a judicial construction of the will, *held*, that whether the executors took a trust estate or were simply donees of a trust power, there was no suspension of the power of alienation, as they could, at any time after the testator's death, have conveyed an absolute fee in possession; that neither the direction as to notice, nor the discretion as to the sale involved a suspension of the power of alienation within the meaning of said statute; also, that by the will there was an absolute conversion of the real estate into personality as of the time of the testator's death. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TOWNS.

See TOWN BONDING.

TOWN BONDING.

1. Proceedings taken to bond the plaintiff in aid of a railroad resulted in a decision that bonds of the town should be issued to an amount specified, and commissioners on behalf of the town were appointed to subscribe for the stock and to issue the bonds. Said commissioners, the railroad corporation and one P. entered into an agreement, by the terms of which the former were to issue the bonds and place them in the hands of P., as trustee, to be exchanged for an equal amount of stock as the work of construction progressed. This

action was brought against the parties to that agreement, to have said proceedings declared null and void, to enjoin the negotiation or disposition of the bonds and to require their cancellation. The referee found the bonded proceedings to be void for want of jurisdiction, but that P. had sold a portion of the bonds. Defendants were required to account for the proceeds, they to be allowed for all sums paid out of the same in good faith in constructing the road or for any legal purpose mentioned in the agreement. An accounting was had under these findings, and a judgment was rendered against P. for the balance of the proceeds in his hands. Plaintiff objected to the allowance for moneys expended. *Held* untenable; that to entitle it to recover any of the proceeds of the bonds plaintiff must recognize their invalidity, as, if it claimed them invalid, none of the proceeds thereof belonged to it and it could only recover upon the theory that the bonds had been made and negotiated wrongfully and without authority, and had gone into the hands of *bona fide* holders, who could enforce the same; that, therefore, as plaintiff was in court claiming the proceeds of the bonds, it could take no benefit from the finding as to their invalidity, and P., as trustee, was entitled to credit for all sums paid out by him within the scope of his duty and authority. Also *held*, that P. was properly allowed his commissions. *Town of Lyons v. Chamberlain.* 578

2. The agreement, as made, limited the application of the bonds or their proceeds to the construction of the road in the county of W.; subsequently the commissioners gave to P. a written authority to pay out the bonds for the construction of the road in an adjoining county. *Held*, that P. was entitled to be allowed for payments so made. *Id.*

3. *It seems* that had the action been maintained upon the finding as to the invalidity of the bonds, no injury was sustained, and no recov-

ery could have been had beyond the costs and expenses incurred by the town in defending itself against an attempted enforcement of the bonds, as, if the proceedings were without jurisdiction and the bonds issued absolutely without authority, not by the town but by strangers falsely simulating authority, plaintiff was not estopped by the recitals in the bonds, and they could not be enforced against it, even under the decisions of the U. S. courts, by a *bona fide* holder. *Id.*

TRESPASS.

1. Plaintiff, at the request of E., laid a small main in the lands of the latter in front of a row of dwelling-houses, for the purpose of supplying them with gas. It was made large enough to supply another row of houses, which E. proposed to erect, and was connected with a large main running through a street. E. sold the houses and the owners contracted with defendant to supply their houses with gas. Whereupon defendant disconnected the small main from the large main in the street and connected it with its own main laid in the same street. *Held*, that an action to restrain defendant from so using said small main and to compel it to reconnect it with plaintiff's large main was maintainable; that the action of defendant was a trespass upon plaintiff's property, and the character of the injury was such that an injunction was proper. *Poughkeepsie Gas Co. v. Citizens' Gas Co.* 493

2. The firm of W. & Co., plaintiff's assignors, occupied a store in the city of New York, having a cellar and sub-cellar, and also a vault under the sidewalk in front. Defendant erected a building on an adjoining lot, and constructed a vault under the sidewalk in front thereof. In so doing it took up the curb and gutter of the street, and excavated a space in the street extending about two feet outside of the curb, and left the space in front of the outer wall of

the vault unfilled. It also excavated a space on the lot of W. & Co., between the wall of said vault and the wall of the vault of W. & Co., which did not come quite to the line of the lot; such excavation extended below the foundation of the latter wall; this space communicated with that left in the street. The grade of the street descended so that when the premises were in the ordinary condition the surface water flowed through the gutter in front of the store of W. & Co., and passed off through the gutter in front of defendant's premises. Defendant constructed a dam from the sidewalk in front of the store of W. & Co., which turned the water across the street into the gutter on the other side, but during a heavy rain the dam gave way and let the water into said excavation; thence it found its way under the foundation of and into the vault of W. & Co., and their sub-cellar, damaging goods therein. In an action to recover the damages, *held*, that defendant was liable, and this without regard to any question of negligence; that it was no defense that the dam was built properly, and due care was taken on its part to protect the premises. *Mairs v. Manhattan R. E. Assn.* 498

3. It was claimed by defendants that the water, or a portion thereof, which did the injury found its way through holes in the side wall of the store of W. & Co. *Held* immaterial; that they were under no obligation to make their wall impervious to water wrongfully thrown upon their premises. *Id.*

4. Also *held*, that interest was properly allowed as an item of damages. *Id.*

5. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim.

Held, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. *Id.*

TRADE-MARK.

1. Where there is a simulation of a trade-mark, and the intent becomes a subject of inquiry, the form, color and general appearance of the packages may be material; but a party cannot appropriate an ordinary and usual form of package and fashion of label, and exclude others from its use, or the use of any thing resembling it; to sustain an action restraining such use there must be an imitation of something that can legally be appropriated as a trade-mark. *Morgan's Sons Co. v. Troxell.* 292

2. The mere idea represented by some figure, on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated as a trade-mark. *Id.*

3. An action cannot be maintained to restrain a defendant from selling his own goods in packages and with labels he has a legal right to use, and which do not infringe upon any trade-mark of the plaintiff, because of fraudulent representations and devices on the part of defendant to palm off his goods as those of the plaintiff. *Id.*

4. Plaintiff prepared and sold a soap for cleaning and polishing, which was put up in square cakes, wrapped in paper coated with tin-foil, with a band of blue paper about it on which, on one side of the package, is printed in gold letters the label, "Sapolio, for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West street, New York." On the other side, "Enoch Morgan's Sons' Sapolio," with the device of a human face opposite to and reflected in a pan. Defendant thereafter prepared and sold a soap put up in cakes of a different shape from those of plaintiff, wrapped

in tin-foil, with a band of blue paper; on one side printed in large, gilt letters, "Troxell's Pride of the Kitchen Soap," then a small figure of a monkey looking at some indistinct object held in his hand, on each side of, which is the word "trade-mark," and below in small letters the words, "scouring and polishing." On the other side is printed in large letters, the words, "Pride of the Kitchen Soap," and six lines in small letters describing its uses. *Held*, that the facts did not show any infringement of a trade-mark and that an action was not maintainable to restrain defendants from so preparing and selling their soap. *Id.*

TRIAL.

1. *It seems* that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. *People v. B'klyn, etc., R. R. Co.* 75
2. The attorney-general, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. *Id.*
3. Two policies of fire insurance contained a condition that the company would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied. *Held* error; as although the condi-

tion had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages. *Milworth v. Aetna Ins. Co.* 186

4. On trial at Special Term of an action, to redeem a certificate of membership in the New York Cotton Exchange, defendant demanded a trial by jury. This was denied, and a judgment directing a transfer of the certificate to plaintiff was rendered. *Held*, that a refusal of the demand was not error, as the action was an equitable one, and the effect of the ruling was to make it impossible to turn it into an action at law and compelled plaintiff to stand or fall in equity; also that the demand did not deny or challenge the equitable jurisdiction; and as no motion was made to dismiss the complaint or for judgment on the ground that no equitable cause of action had been shown, and as no exception was taken to the findings of law or fact, the defendant, by not objecting, submitted to the equitable jurisdiction and the question could not be considered here. *Powell v. Waldron.* 828
5. On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception. *Held* no error; that while defendants were entitled to the whole of the letters, their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. *Wright v. Cabot.* 570
6. Where there has been an opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing

the return, no objections because of such imperfect execution will be heard on the trial. *Id.*

— *Improper evidence should be objected to when offered, if received without objection court not bound to charge jury to disregard it.*

See Bradner v. Strang. 299

— *Where, although question to witness is too broad, the answer is confined to precise issue, there is no error.*

See Wright v. Cabot. 570

— *Where upon trial parol evidence is given without objection as to terms of contract, in addition to a written contract, and the question as to where the contract was, is thus submitted as a question of fact, and there is evidence sufficient to sustain a verdict, it is conclusive here.*

See DeBevoise v. P. & S. S. Co. (Mem.) 614

— *Where, in an action to recover the purchase-price of an article, the defense was that the purchase was conditioned upon the article working well, the court charged that the fact that defendant did not return the article was no error.* *Id.*

TRUSTS AND TRUSTEES.

1. The will of J., after various legacies, gave his residuary estate to three children named; the executors being directed to invest and keep the same invested, to apply the interest to the support and education of said children until they respectively arrived of age; after that to pay to each the interest upon one-third, and after the death of two of the children to divide the principal between the survivor and the heirs of the two deceased. The executors were empowered to sell and convey the real estate and to invest the proceeds for the purposes of the will. One of the executors died, the others, after paying debts and legacies, and settling the estate in all respects, except as to the sale and distribution of the proceeds of the real estate, resigned. Their resignation was accepted by the Supreme Court and

two more trustees were appointed; at this time the three children were living and all were of age. *Held*, that conceding the executors were merely donees of a power of sale, it was a general power and imperative, and so subject to the same statutory provisions as to the substitution of new trustees as are applicable to express trusts; that the new trustees therefore were lawfully substituted and had power to convey; also that the trust or power was not ended by the payment of debts and legacies and settlement of the executors' accounts, as the principal purpose of the will yet remained to be carried out. *Harrar v. McCus.* 139

2. F. and H., the new trustees, united in a conveyance of the real estate to E., one of the children interested in the residue, who gave a mortgage thereon, and afterward conveyed it to F. as trustee, H. having meanwhile resigned. F. contracted to sell to defendant subject to the mortgage, he agreeing to have H. join in the deed and also to procure a deed from E. of any interest he might have. Defendant declined to complete the purchase claiming, aside from want of power in the trustees to sell, the sale to E. was only colorable; that the reconveyance subject to the mortgage was unauthorized, and that the resignation of H. was ineffectual because the order accepting it did not show on its face that it was an order of the court. On submission of the controversy under the Code, *held*, that the objections, if tenable, were obviated by the offer to have E. and H. join in the conveyance, and that the title which the testator had could thus be vested. *Id.*

3. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to guide the action of a trustee. *Wager v. Wager.* 161

4. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity,

- although no express trust be created by the will. *Id.*
5. *It seems* that it is the duty of trustees holding funds for investment to use due diligence to keep them invested; if they have retained them uninvested beyond a reasonable time, six months being usually allowed, they are *prima facie* liable for interest, and the burden is upon them, upon an accounting, to explain or justify the delay. *Lent v. Howard.* 169
 6. The executors were directed by the will to set apart the sum of \$10,000 on bond and mortgage, the income to be expended for the maintenance of the daughter during life; it also gave to the widow an annuity of \$700, the executors being directed to invest sufficient to produce it. The executors had not, at the time of the trial, made any investments, and had, before that time, transferred to the plaintiffs, who were the widow and daughter, the latter then being of age, and who were the only persons interested, all the real and personal estate of the testator in their hands. Plaintiffs asked that the trusts be extinguished. *Held*, that the court had no authority to permit the alienation or abrogation of such a trust. *Id.*
 7. The creation of a trust in real estate does not *ipso facto* suspend the power of alienation, it is only suspended where a trust term is created either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. *Robert v. Corning.* 225
 8. Where the trustee is empowered to sell without restriction as to time, that being left to his discretion, he to receive, pending the sale, the rents and profits for the benefit of beneficiaries, the power of alienation is not suspended, although a sale be postponed by the non-action of the trustee. The fact that the interest of the beneficiaries is inalienable by statute during the existence of the trust does not suspend the power of alienation. *Id.*
 9. The mere fact that it may be the duty of executors, in the exercise of their discretion, to postpone a sale, to await a more favorable market, does not constitute such a restraint as suspends the power of alienation within the statute. *Id.*
 10. So also said statute is not violated by directions as to sales which require the giving of notice or the doing of other preliminary acts, which may involve some delay in the actual conversion. *Id.*
 11. *It seems* that if the limitation of the interests in the proceeds is illegal, the power of sale to accomplish that purpose may be void. *Id.*
 12. Defendant purchased and paid for certain lands which he caused to be deeded to F., upon an oral understanding that the latter would hold them subject to his order. F., thereafter, at the request of defendant, pursuant to such understanding, and without other consideration, conveyed the lands to defendant's son, the plaintiff, who agreed orally to hold the title for the use and benefit of defendant and subject to his order. Defendant went into possession at the time of the original purchase, managed the lands and received the rents and profits. Plaintiff, at the request of the defendant, conveyed the lands, receiving for a portion of the purchase-money, two bonds and mortgages; one bond and accompanying mortgage defendant sold for his own benefit, and at his request plaintiff assigned them, not questioning his father's title. The other bond and mortgage was, with plaintiff's knowledge, delivered to defendant, and upon the refusal of the latter to deliver them up on demand plaintiff brought this action in equity to have it adjudged that he was owner of them and entitled to the possession. *Held*, that the provision of the statute of uses and trusts (1 R. S. 728, § 51) declaring that where a grant is made to one person, the consideration being paid by another, no use or trust shall result in favor of the latter, but title shall vest in the

former, had no application; that, conceding the trust to be invalid, it having been executed by plaintiff, the right to the purchase-money vested at once in the defendant; that plaintiff, by operation of law, took the bond and mortgage as trustee for defendant, and those securities being personal property the statute had no application. *Robbins v. Robbins.* 251

18. *It seems* that if said statute, or the provision of the statute of frauds prohibiting the creation of trusts in lands, save by a writing (2 R. S. 134, § 6), applied, plaintiff had no such right to the securities as a court of equity would enforce. *Id.*

—*Liability of trustees of manufacturing corporation for making false report.*

See Bonnell v. Griswold. 122

—*When assignment for benefit of creditors may be enforced as a trust, in payment of a usurious loan.*

See Chapin v. Thompson. 270

—*When party is sought to be charged as trustee, he is entitled to credit for all sums paid out by him within scope of his duty, and also for his commissions.*

See Town of Lyons v. Chamberlain. 578

UNITED STATES.

The United States, by voluntarily appearing in a State court as a claimant to a fund therein, subjects itself to the jurisdiction of the court, and will be bound by its decision. *Johnston v. Stimmel.* 117

USES.

See TRUSTS AND TRUSTEES.

USURY.

1. Where an assignment for the benefit of creditors makes specific provision for the payment of a debt, the assignor cannot prevent the application of the property, in

accordance with the terms of the instrument, because of the usurious character of the debt. *Chapin v. Thompson.* 270

2. After the execution of a bond and mortgage, to secure a usurious loan, the borrower executed to the lender, and the latter accepted, a general assignment for the benefit of creditors; in the schedule of creditors contained in the inventory, made pursuant to the statute (Chap. 466, Laws of 1877), was inserted the name of said lender, with the amount of the loan which was described as "for money loaned secured by mortgage," and among the assets the mortgaged lands were included with the statement that they were mortgaged to secure said debt. In an action to foreclose the mortgage brought by an assignee of the mortgagee, *held*, that judgment directing the surrender and cancellation of the bond and mortgage because of the usury was error; that to the extent of the money actually loaned and legal interest thereon, plaintiff was entitled to the benefit of the assignment, that said assignment was not within the statute avoiding contracts or securities because of usury (1 R. S. 772, § 2), as it was a mere trust or appropriation of property made by the debtor, independent of the usurious contract, which gave to the creditor rights adhering to the trust property until the debt was satisfied or the property applied upon it according to the terms of the trust; also that the fact that the lender was the assignee was immaterial; and that plaintiff's rights were in all respects the same as his assignors. *Id.*

WAIVER.

—*When fraud not waived by retention of an account.*

See Bradner v. Strang. 299

WILLS.

1. The will of J., after various legacies, gave his residuary estate to

three children named; the executors being directed to invest and keep the same invested, to apply the interest to the support and education of said children until they respectively arrived of age; after that to pay to each the interest upon one-third, and after the death of two of the children, to divide the principal between the survivor and the heirs of the two deceased. The executors were empowered to sell and convey the real estate and to invest the proceeds for the purposes of the will. One of the executors died, the others, after paying debts and legacies, and settling the estate in all respects, except as to the sale and distribution of the proceeds of the real estate, resigned. Their resignation was accepted by the Supreme Court and two more trustees were appointed; at this time the three children were living and all were of age. *Held*, that conceding the executors were merely donees of a power of sale, it was a general power and imperative, and so subject to the same statutory provisions as to the substitution of new trustees as are applicable to express trusts; that the new trustees therefore were lawfully substituted and had power to convey; also that the trust or power was not ended by the payment of debts and legacies and settlement of the executors' accounts, as the principal purpose of the will yet remained to be carried out. *Farrar v. McCue*. 139

2. Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title and the heirs are entitled at law to the intermediate rents and profits. *Lent v. Howard*. 169

3. If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the

converted fund; the heir may be compelled to account therefor to the executor, and the latter to the beneficiary, for so much thereof as is received by him, as well as for the proceeds of sales. *Id.*

4. Where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion, and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale. *Id.*

5. The will of L., after giving various legacies, contained a clause authorizing his executors to sell all of his real estate, except his homestead farm, at such times and prices as to them should seem best for the interest of the estate, and after carrying out the foregoing provisions, to invest the balance of the estate in their hands in bonds and mortgages or in State stocks. One-half of such balance the testator gave to his daughter L., to be paid to her when she arrived of age; in case of her death, before the testator's wife, without lawful issue, the same to be paid to the wife. The other half he gave to his wife to be paid to her ten years after his decease. In case of her death before the daughter, said one-half to be paid to the daughter. The homestead farm was devised to the wife for life. The executors received the rents and profits of the real estate. In an action for an accounting, *held*, that by said clause there was a conversion of the testator's real estate, with the exception specified, into personalty, as of the time of his death, and a gift of the converted fund together with the intermediate income to the wife and daughter with cross-remainders; and that the rents and profits received by the executors, and the proceeds of sales were properly brought into the accounting. *Id.*

6. The testator left five farms, including the homestead farm, and several houses and lots in the vil-

- lage of L. R. B., one of the executors, who lived several miles from L. R., at the request of the other executors, including the widow, removed to that village, took charge of all the real estate and continued in charge thereof, except two farms sold, working upon, managing and improving it for nearly fifteen years. The gross rents and profits were entered in the executor's accounts, and also the disbursements. The will gave to the executors \$1,000 in addition to their commissions. The referee found that the services of B. exceeded in value his commissions and the sum so given. *Held*, that B. was entitled to be allowed out of said gross rents and profits, in the nature of a charge thereon, a suitable compensation for his services; that the rule prohibiting an executor from charging more than the statutory commissions for his personal services in the discharge of the duties of his trust did not apply, as the services so rendered were no part of his executorial duties. *Id.*
7. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to guide the action of a trustee. *Wager v. Wager.* 161
8. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity although no express trust be created by the will. *Id.*
9. Any person claiming an interest in the personalty, either as legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such interest in his own right, bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. *Id.*
10. *It seems*, that where complete relief can be obtained in a Surrogate's Court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. *Id.*
11. An heir at law or devisee, who claims a mere legal estate in real property, when there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. *Id.*
12. Where, however, the court has obtained jurisdiction for the purpose of establishing the equitable rights of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy. *Id.*
13. The executors were directed by the will to set apart the sum of \$10,000 on bond and mortgage, the income to be expended for the maintenance of the daughter during life; it also gave to the widow an annuity of \$700, the executors being directed to invest sufficient to produce it. The executors had not, at the time of the trial, made any investments, and had, before that time, transferred to the plaintiffs, who were the widow and daughter, the latter then being of age, and who were the only persons interested, all the real and personal estate of the testator in their hands. Plaintiffs asked that the trusts be extinguished. *Held*, that the court had no authority to permit the alienation or abrogation of such a trust. *Id.*
14. The will of R. directed his executors to sell and dispose of his residuary estate; that portion of the real estate situate in this State to be sold at public sale in the city of New York after three weeks published notice, the other real estate in such places and manner as the executors should deem best. After directions as to the disposition of the proceeds, there followed this clause: "In view of the present great depression in real estate, it is my will that my executors * * * exercise their discretion as to the time

- to sell the same not longer than three years after my decease." The rents, income and profits up to final distribution, the executors were directed to divide semi-annually "among those to whom the bequests are made" in certain proportions. In an action to obtain a judicial construction of the will, *held*, that whether the executors took a trust estate or were simply donees of a trust power, there was no suspension of the power of alienation, as they could, at any time after the testator's death, have conveyed an absolute fee in possession; that neither the direction as to notice, nor the discretion as to the sale involved a suspension of the power of alienation within the meaning of said statute; also, that by the will there was an absolute conversion of the real estate into personalty as of the time of the testator's death. *Robert v. Corning.* 225
15. The executors were directed, after disposing of said residuary estate, and deducting from the proceeds expenses and charges, and a legacy given to the testator's wife, to divide the remainder into fifty equal parts, to pay over twelve of such parts to the testator's son C., if then surviving; in case of his death prior to such distribution, then to his lawful issue. Twenty-eight of said parts were given in similar language to three other children, and the executors were directed to pay the remaining ten shares to an incorporated college. The college was restricted to the use of the income of its portion, and in case of its discontinuance, its trustees were directed to apply the fund to certain religious purposes specified. *Held*, that the restriction did not create a perpetuity, and if the provision in case of discontinuance was void, it resulted simply in confirming an absolute title in the corporation. *Id.*
16. In case of the death of any child before the testator, the will gave "such legacies, estate, share or proportion of the one so dying unto his, her or their lawful issue, such issue to take the estate or share his, her or their parent would have been entitled to if living." *Held*, that the intent of the testator was to give to his children the absolute title to their respective shares, subject to a limitation over in case of death before distribution, and that the ultimate vesting could in no event be postponed longer than the life of the parent. *Id.*
17. The will directed that all charges appearing on the testator's books of account against any of the said legatees should be considered as part of his residuary estate, and the executors were directed to deduct the amount from the share of said legatee. *Held* valid. *Id.*
18. *It seems* that a surrogate has jurisdiction to pass upon the construction of a will, where the right to the legacy depends upon a question of construction which must be determined before a decree of distribution can be made. *Riggs v. Cragg.* 479
19. Where a testator, whose will authorized his executor to sell all his real and personal estate, and disposed of the proceeds, after the making thereof, had a child born, and thereafter died leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," *held*, that under the statute (2 R. S. 65, § 49), the whole real estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that, where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of sale, but that she could maintain ejectment to recover the same. *Smith v. Robertson.* 555
20. Where, however, it appeared that the real estate was at the time of the testator's death subject to a mortgage which the grantee paid, *held*, that the judgment should be without prejudice to his right to a lien for the amount so paid, or to be subrogated to the rights of the mortgagee. *Id.*

ERRATA.

In *Schmitz v. Langhaar* (88 N. Y. 503), the word "assignee" in fourth line of head-note should read "assignor." The same correction should be made in index, page 686, in eighth line of left-hand column, under heading "Counter-claim"

In *Church v. Kidd* (88 N. Y. 653), in twenty-third line from top of page after the words "said leases" insert "they shall be transferred to plaintiff."

In *Kain v. Smith* (89 N. Y. 376), in fourth line from end of head-note the word "plaintiff" should read "defendant"

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